

**WHEN RECORDED RETURN TO:**

**City of Mesa  
Attn: City Clerk  
20 E. Main Street  
Mesa, Arizona 85211**

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**DEVELOPMENT AGREEMENT**

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**CITY OF MESA, ARIZONA,  
an Arizona municipal corporation**

**AND**

**WAVEYARD DEVELOPMENT, LLC,  
A Delaware limited liability company**

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**June \_\_, 2007**

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**Exhibits**

A --	Legal Description of Property
A-1 --	Depiction of Property
B --	Development Master Plan
C --	Minimum Public Improvements
D --	Land Contract
E --	Prohibited Uses
F --	Insurance Requirements
G --	Non-Disturbance and Recognition Agreement

## DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT (the "**Agreement**") is made as of the \_\_\_\_ day of June, 2007, by and between the CITY OF MESA, ARIZONA, an Arizona municipal corporation (the "**City**"), and WAVEYARD DEVELOPMENT, LLC, a Delaware limited liability company ("**Developer**"). The City and Developer are sometimes referred to herein collectively as the "**Parties**," or individually as a "**Party**."

### RECITALS

A. Pursuant to the terms of this Agreement, Developer shall purchase or otherwise acquire an interest in that certain real property located in the City and currently owned by the City, consisting of approximately 125 acres (of which approximately one hundred and twenty (120) acres shall be acquired by Developer in fee, and approximately five (5) acres of which shall be leased by the City to Developer), the legal description and a depiction of which are attached as Exhibit A and Exhibit A-1, respectively, hereto (the "**Property**"). The depiction attached as Exhibit A-1 is for illustrative purposes only, and the legal description of the Property attached as Exhibit A, as modified pursuant to Section 1(wv) shall control in the event of any discrepancy or ambiguity.

B. Developer shall develop the Property as a water-oriented entertainment project along with a destination resort, with appurtenant retail, office, commercial, and residential uses (collectively, the "**Project**"), and thereafter (subject to certain interests to be retained by Developer or others) may lease or sell portions of the Property to others on the terms and conditions prescribed in this Agreement.

C. The City acknowledges that the development of the Project is beneficial to the City, and that such development will generate transaction privilege tax and other revenues for the City. The City also believes that the development of the Project will generate substantial non-monetary benefits for the City, including, without limitation, the creation of new jobs and facilitate the establishment of the City as a resort and entertainment destination for City residents, as well as other residents of Maricopa County, the State of Arizona, and the southwestern United States.

D. The development of the Project is of such significance that the City desires to encourage and facilitate development of the Project. The Parties intend that the uses contemplated by this Agreement are consistent with the City's existing General Plan, as amended by GP Minor 07-06 (the "**General Plan**").

E. The City intends, for the benefit of its residents and in light of the sale of portions of what is now Riverview Park to enable the construction of the Project, to expand or improve existing park sites, or to obtain additional park property for the residents of the City.

F. Developer acknowledges that the development of the Project may generate substantial economic benefits for Developer, and that the Project is of such significance that the City requires certain assurances concerning the time schedule for the completion of certain

improvements, the design and development of the Project, and such other assurances as are set forth in this Agreement. In furtherance of these goals, Developer has submitted an application to rezone the Property (in case Z07-35) to the City's C-3 zoning category, together with a Development Master Plan Overlay Zoning District, Council Use Permit for the residential component of the Project, and Bonus Intensity Zone Overlay Zoning District for portions of the Project to allow for structures and buildings of stories and heights in excess of those allowed by the base zoning category (collectively, the "**Zoning**").

G. Developer's Development Master Plan for the Property is attached to this Agreement as Exhibit B (the "**Development Master Plan**"), which may be changed through the City review and approval processes for the Project, as allowed by the Rules.

H. The City has determined that the development of the Project pursuant to this Agreement will result in significant planning, economic and other public benefits to the City and its residents by, among other things: (i) increasing tax revenues to the City arising from or relating to the improvements to be constructed on the Property; (ii) creating a substantial number of new jobs and otherwise enhancing the welfare of the residents of the City; and (iii) providing a vibrant, new destination resort and recreational experience, as well as a shopping area and offices, to benefit the City's residents.

I. The Parties understand and acknowledge that this Agreement is a "Development Agreement" within the meaning, and entered into pursuant to the terms, of A.R.S. § 9-500.05, and that the terms of this Agreement shall constitute covenants running with the Property as more fully described in this Agreement.

J. The Parties also understand and acknowledge that this Agreement is authorized by and entered into accordance with the terms of A.R.S. §9-500.11. The actions taken by the City pursuant to this Agreement are for economic development activities as that term is used in A.R.S. §9-500.11, will assist in the creation and retention of jobs, and in other ways will improve and enhance the economic welfare of the residents of the City. Also, pursuant to A.R.S. § 9-500.11, as amended, the City has previously adopted a notice of intent to enter into this Agreement as required by A.R.S. § 9-500.11.K and made the findings required by A.R.S. § 9-500.11.D, such findings having been verified by an independent third party before the City entered into this Agreement. Such findings, by this reference, are incorporated into this Agreement as though set forth in their entirety herein.

K. The Parties also understand and acknowledge that pursuant to the terms of Section 613 of the City Charter, which provides in part that "the City shall not expend public funds, grant tax concessions or relief, or incur any form of debt in an amount greater than one million, five hundred thousand dollars (\$1,500,000) . . . to construct or aid in the construction of any amphitheater, sports complex, cultural or entertainment facility, arena, stadium, convention facility, or multipurpose facility without approval of the majority of the electorate . . ." (the "**Section 613 Incentives**"), this Agreement shall not be effective unless and until the Section 613 Incentives are approved by a majority of the City electorate at the Election.

## **AGREEMENTS**

Now, therefore, in consideration of the foregoing recitals and representations and the mutual promises contained in this Agreement, and for other good and valuable consideration, receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. **Definitions.**

In this Agreement, unless a different meaning clearly appears from the context:

(a) **“Additional Municipal Benefits”** means those undertakings not required by law which Developer has committed to perform pursuant to the express terms of this Agreement, which the City agrees will provide direct and indirect tangible and intangible benefits to the City, and which are described, in part, in Section 7 of this Agreement.

(b) **“Affiliate,”** as applied to any person, means (i) any person directly or indirectly controlling, controlled by, or under common control with, that person or a blood relative or spouse of such person, if such person is a natural person; (ii) any person holding with power to vote ten percent (10%) or more of the outstanding voting securities, partnership interests, limited liability company interests, or other equity interests of such other person; (iii) any person holding ten percent (10%) or more of whose outstanding voting securities, partnership interests, limited liability company interests, or other equity interests are directly or indirectly owned, controlled, or held with power to vote by such other person. For the purposes of this definition, (A) **“control”** (including with correlative meaning, the terms “controlling,” “controlled by” and “under common control”), as applied to any person, means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of that person, whether through the ownership of voting securities, by contract or otherwise, and (B) **“person”** means and includes natural persons, corporations, limited partnerships, general partnerships, joint stock companies, joint ventures, associations, limited liability companies, limited liability partnerships, limited liability limited partnerships, trusts, land trusts, business trusts or other organizations, whether or not legal entities.

(c) **“Agreement”** means this Agreement, as amended and restated or supplemented in writing from time to time, and includes all exhibits and schedules hereto. References to Sections or Exhibits are to this Agreement unless otherwise qualified. The Recitals set forth in Paragraphs A through K, inclusive, are incorporated herein by reference and form a part of this Agreement.

(d) **“Applicable Laws”** means the federal, state, county and local laws (statutory and common law) ordinances, rules, regulations, permit requirements, and other requirements and official policies of the City which apply to the development of the Property, including but not limited to the Rules.

(e) **“Applicable Water Laws”** means federal, state, county, city, and local water laws and water quality laws (statutory and common law) ordinances, rules, regulations, permit requirements, including but not limited to requirements and regulations from Maricopa County, Arizona Department of Water Resources (ADWR) and Arizona Department of

Environmental Quality (ADEQ), and A.R.S. § 45-131 et. seq. (the “**Lakes Bill**”), as the same may be amended from time to time.

(f) “**A.R.S.**” means the Arizona Revised Statutes as now or hereafter enacted or amended.

(g) “**City**” means the Party designated as City on the first page of this Agreement.

(h) “**City Code**” means the Code of the City of Mesa, Arizona, as amended from time to time.

(i) “**City Council**” means the City Council of the City.

(j) “**City Development Fees**” means as defined in Section 4.3.

(k) “**City Improvements**” means any public infrastructure improvements in and around the Property including, without limitation, the Minimum Public Improvements and any other public improvements required by the Rules and/or the City in connection with the development of the Project.

(l) “**City Representative**” means as defined in Section 13.1.

(m) “**City Well #27**” means that existing well (and appurtenant facilities) designated by the Arizona Department of Water Resources as Well Number 55-583894 and located outside the boundaries of the Property, ownership of which shall remain at all times with the City.

(n) “**Close of Escrow**” means as defined in the Land Contract.

(o) “**Commencement of Construction**” means both (i) the obtaining of a building, excavation, grading or similar permit by Developer for the construction of the Minimum Improvements and (ii) the actual commencement of physical construction operations on the Property in a manner necessary to achieve Completion of Construction of the Minimum Improvements and with the intent and ability to diligently continue and pursue construction of the Minimum Improvements to completion.

(p) “**Completion of Construction**” means the date on which one or more final certificates of occupancy or similar final permits or approvals have been issued by the City for the Minimum Improvements, and such Minimum Improvements are open for business to the public with the intent that such Minimum Improvements remain open for business for the foreseeable future.

(q) “**Control**” means as defined in Section 14.2.1.

(r) “**Denial**” means as defined in Section 12.6.

(s) “**Design Guidelines**” means as set forth in Section 4.1(b).

- (t) **“Designated Lenders”** means as set forth in Section 14.21.
- (u) **“Developer”** means the Party designated as Developer on the first page of this Agreement, and its successors and assigns that conform with the requirements of this Agreement.
- (v) **“Developer Control Group”** means as defined in Section 14.2.1.
- (w) **“Developer Representative”** means as defined in Section 13.1.
- (x) **“Development Master Plan”** means as defined in Recital G.
- (y) **“Effective Date”** means the date on which all of the following have occurred: this Agreement has been adopted and approved by the City Council, executed by duly authorized representatives of the City and Developer, recorded in the office of the Recorder of Maricopa County, Arizona, and the Section 613 Incentives are approved by a majority of the electorate voting at the City election scheduled for such purpose.
- (z) **“Election”** means as defined in Section 2.
- (aa) **“Enforced Delay”** means as defined in Section 12.6.
- (bb) **“Failure”** means as defined in Section 12.6.
- (cc) **“Feasibility Period”** means as defined in the Land Contract.
- (dd) **“General Plan”** means as defined in Recital D.
- (ee) **“Land Contract”** means as defined in Section 3.
- (ff) **“Lease”** means as defined in Section 3.
- (gg) **“Lease Property”** means as defined in Section 3.
- (hh) **“Lender” or “Lenders”** means as defined in Section 14.21.
- (ii) **“Minimum Entertainment Improvements”** means Private Improvements consisting of a surfing wave pool and beach experience, a whitewater rafting, kayaking, and paddling course, and a scuba, diving and snorkeling lagoon. The surfing wave pool shall be of a size and scale to deliver a meaningful surfing experience, including the ability to generate waves of at least 10 feet in height and a water pumping capacity of at least 750,000 gallons per minute. The whitewater and kayaking course will be modeled loosely upon other existing parks including Olympic parks in Athens, Barcelona, and Sydney and Charlotte, North Carolina. The design of the whitewater facility will include the following parameters: (1) at least 4,000 lineal feet of channels and ponds; (2) a water pumping capacity of at least 500,000 gallons per minute; (3) fixed and operable channel obstacles; and (4) a mechanical conveyance system. The scuba and dive experience shall allow for a dive to a depth of at least 33 feet. The

scuba, dive and snorkeling experience shall be enhanced by underwater themes (e.g., a “sunken city,” coral reefs, columns, etc.) and shall have a capacity of at least fifty concurrent divers.

(jj) **“Minimum Improvements”** means the Minimum Entertainment Improvements, the Minimum Resort Improvements, the Minimum Public Improvements and the Minimum Retail Improvements.

(kk) **“Minimum Public Improvements”** means the public infrastructure to be constructed by the Developer as set forth in Exhibit C.

(ll) **“Minimum Resort Improvements”** means Private Improvements consisting of: (1) a minimum 400-room full service resort hotel that includes a spa, a minimum 30,000 square-foot conference center, and a minimum 80,000 square-foot indoor water park; the hotel shall be of the quality and provide the full services and amenities generally associated with an AAA 4 Diamond and Mobil 4 Star resort.

(mm) **“Minimum Retail Improvements”** means Private Improvements consisting of a minimum 200,000 leasable square feet of retail shops, exclusive of grocery, warehouse and similar stores.

(nn) **“Monthly Tax Report”** means as defined in Section 8.1(a).

(oo) **“Multiple Location Taxpayer”** means as defined in Section 8.5.

(pp) **“Note”** means as defined in the Land Contract.

(qq) **“Non-Performance”** or **“Event of Non-Performance”** means one or more of the events described in Sections 12.1 or 12.2; provided, however, that the available remedies shall be limited to those set forth in Section 12.

(rr) **“Order”** means as defined in Section 12.6.

(ss) **“Party”** or **“Parties”** means as designated on the first page of this Agreement.

(tt) **“Private Improvements”** means the Minimum Entertainment Improvements, Minimum Resort Improvements, Minimum Retail Improvements and any other improvements other than public improvements constructed by Developer that constitute part of the Project.

(uu) **“Prohibited Uses”** means as defined in Section 7.1.

(vv) **“Project”** means as defined in Recital B.

(ww) **“Property”** means as defined in Recital A and as described in Exhibit A; provided, however, that since the legal description attached as Exhibit A presently describes more real property than the Property (including portions of a City park to be retained by the City), the City (acting through its City Manager) shall be entitled to modify the legal description

of the Property in the City's sole discretion during the Feasibility Period, which modified legal description shall accurately and finally describe the Sale Property (which shall not exceed 121 acres) and the Lease Property, and Developer shall accept such modified legal description of the Property as presumptively correct and final.

(xx) **"Public Vote"** means as defined in Section 2.

(yy) **"Rebate Period"** means as defined in Section 8.2.

(zz) **"Rules"** means the City's General Plan, Zoning Ordinance, Subdivision Regulations, Design Review Board Regulations and approvals, all applicable zoning, rezoning, site plan and plat approval requirements, building and permit requirements, and all other applicable rules, ordinances, regulations and standards that are in effect at the time Project-related submittals are made to the City.

(aaa) **"Reimbursable Sales Taxes"** means, for the purposes of this Agreement, a three-quarter of one percent (.75%) portion of the one-and two-tenths percent (1.2%) general fund portion of the City's one and three-quarter percent (1.75%) Transaction Privilege Taxes—so that of the 1.75% transaction privilege tax collected from the Property, City will retain 1% and the Reimbursable Sales Taxes will be .75%—that are imposed on activities encompassed by taxable Transaction Privilege Tax classifications contained in the current Mesa City Code, or as such classifications may be amended from time to time. By way of example, these classifications include, but are not limited to: advertising, amusements, construction contracting, hotels, restaurants, and retail sales. Additionally, Reimbursable Sales Taxes, for purposes of this Agreement, shall include (i) one and one-half percent (1.5%) of the City's three percent (3.0%) Transient Occupancy Tax, and (ii) three-quarter of one percent (.75%) of the City's one and three-quarter percent (1.75%) Use Tax—so that of the 3% Transient Occupancy Tax, City will retain 1.5% and the Reimbursable Sales Taxes will be 1.5%, and of the 1.75% Use Tax, City will retain 1% and the Reimbursable Sales Taxes will be .75%. For the purposes of this Agreement, Reimbursable Sales Taxes shall never be increased notwithstanding any increases in the City's Transaction Privilege Tax rate, Transient Occupancy Tax rate, or Use Tax rate, changes in the unallocated portion of the City's transaction privilege taxes, or for any other reason whatsoever. The Parties agree and acknowledge that the portions of the City's taxes that for purpose of this Agreement constitute Reimbursable Sales Taxes as described above, are as follows:

All Transaction Privilege Tax Classifications	.75%
Use Tax	.75%
Transient Occupancy	1.5%

If the City decreases any Transaction Privilege Tax, Use Tax or Transient Occupancy tax from the rate(s) in effect as of the date this Agreement, the amount of the such decrease (the **"Tax Decrease"**) shall reduce Reimbursable Sales Taxes, for purposes of this Agreement, in an amount equal to the Tax Decrease; provided, however, that Reimbursable Sales Taxes do not include any portion of the Transaction Privilege Tax that has been designated by the electors of the City to be used for a specific purpose (e.g., the special taxes commonly referred to as "quality

of life” or street improvement taxes), and further provided that a Tax Decease shall not include any decrease to Transaction Privilege Tax rate increments designated for such specific purpose. By way of example, if the City were to reduce the currently existing 1.2% general fund portion of the Transaction Privilege Tax by two-tenths of a percent (.2%), then Reimbursable Sales Taxes, derived from Transaction Privilege Tax revenue, shall mean the .55% portion of the then City’s 1.0% general fund portion of the Transaction Privilege Tax. “**Transaction Privilege Tax**,” “**Use Tax**” and “**Transient Occupancy Tax**” shall have the meanings ascribed and attributed to them, from time-to-time, in the City Code.

(bbb) “**Sales Tax Rebates**” means as defined in Section 8.1.

(ccc) “**Sale Property**” means as defined in Section 3.

(ddd) “**Taxable Activities**” means as defined in Section 8.1.

(eee) “**Term**” means the period commencing on the Effective Date and terminating on the date on which the Parties have performed all of their obligations hereunder; provided, however, that, except as provided in Section 12.6, if applicable, in no event shall the Term of this Agreement extend beyond the twenty-fourth (24<sup>th</sup>) anniversary of the Close of Escrow (subject only to those matters that are expressly stated in this Agreement as surviving the Term).

(fff) “**Third Party**” means any person (as defined in Section 1(b) above) other than a Party, or an Affiliate of any Party.

(ggg) “**Transfer**” means as defined in Section 14.2.1.

(hhh) “**Transfer Notice**” means as defined in Section 14.2.1.

(iii) “**Treatment Facility**” means the City of Mesa Northwest Wastewater Treatment Facility located adjacent to the Property, and any future expansion to such facilities, at which the City treats its wastewater and conducts other municipal activities related to the handling and disposition of the City’s sewage and other wastewater. The Treatment Facility includes, but is not limited to, a wastewater treatment plant that treats 18 million gallons per day (“MGD”) with potential expansion to treat 30 MGD, or more. The Treatment Facility treats wastewater using nitrification/de-nitrification followed by filtration and disinfection, with separate processing of solid wastes through digestion, dewatering and disposal.

(jjj) “**Zoning**” means as defined in Recital F.

2. Public Vote. Pursuant to the provisions of Section 613 of the City Charter, the City staff shall seek authority from its City Council to conduct an election on November 6, 2007, for the purpose of providing the citizens of the City the opportunity to approve or reject the Section 613 Incentives in this Agreement (the “**Election**”). If the Section 613 Incentives in this Agreement are approved by a majority of the electorate voting at such Election, then this Agreement shall be immediately effective. If the Section 613 Incentives in this Agreement are not approved by a majority of the electorate voting at such Election, then this Agreement shall have no force or effect. If a valid referendum petition is filed with respect to the Zoning, this

Agreement, or any related matters arising with respect to this Agreement, City staff shall seek authority from its City Council to place such referred acts on the ballot for the Election (if such election is called). If the City Council does not call the Election for the Section 613 Incentives in this Agreement and referred issue(s), if any, for November 6, 2007, then this Agreement shall have no force or effect.

3. Sale of Property/Lease of Adjacent Property. Pursuant to the terms of the Agreement to Purchase Real Property and Escrow Instructions (the “**Land Contract**”) set forth in the form attached hereto as Exhibit D and to be executed concurrently with the execution of this Agreement, the City agrees to sell and convey a portion of the Property to Developer (the “**Sale Property**”); and pursuant to the terms of the Lease Agreement described in the Land Contract (the “**Lease**”), the City agrees to lease the approximate five-acre site immediately east of the City’s Treatment Facility (as shown on Exhibit A-1) to Developer for use as an “overflow” parking facility (the “**Lease Property**”). Although the material terms and provisions of the Land Contract shall not change without City Council approval, City (acting through its City Manager) and Developer shall have the right (but not the obligation) to vary or modify, upon their mutual agreement, certain minor, administrative, technical or procedural terms of the Land Contract dealing with periods of time for approvals, completion of property inspections and related due diligence, and the closing of the escrow for the Property as contemplated by the Land Contract; and the City Manager shall have the authority to modify the legal description of the Property as contemplated by and set forth within Section 1(ww). If the closing of escrow for the Property pursuant to the Land Contract does not occur, for any reason, within the period of time permitted for the closing of escrow, then this Development Agreement shall have no force or effect. It is expressly agreed and understood that the term “Sales Tax Rebates,” as defined in Section 9.1 of this Agreement, and Reimbursable Sales Taxes shall not include any sales taxes paid on any leasing revenue paid to the City with respect to the Lease Site.

4. Scope and Regulation of Development.

4.1 Zoning; Design Guidelines; Development Plans.

(a) Zoning. The City agrees to process the Zoning for the Project for consideration by the City Council, with stipulations acceptable to City and Developer. If approved, and provided that Developer is in compliance with all terms and conditions of this Agreement, the Zoning shall be deemed contractually vested as of the Effective Date for the Term (or earlier expiration) of this Agreement. The City agrees to include on the ballot as soon as practicable any valid referendum filed regarding the Zoning.

(b) Design Guidelines. At the time of submission of the first site plan, Developer shall provide to the City the Project’s design elements, including without limitation building materials, colors, architectural plans, landscaping, enhanced paving plans, irrigation, lighting, pedestrian linkages, signage and the architectural and thematic character of the Project (the “**Design Guidelines**”), in sufficient detail as required by the City during its review process, which shall include, but is not limited to, review and approval by the City’s Design Review Board. After construction of a building or site development within the Project, any subsequent alterations or changes to the exterior of any building or to the site development shall be reviewed and approved in accordance with the Design Guidelines and Rules then in effect.

(c) Development Plans/Approval Process. Developer agrees to apply for and thereafter diligently pursue and obtain all necessary City development approvals required under the Rules, all of which shall be in accordance with the City's customary review and approval processes and the Rules. Subject to the Rules and timely compliance by Developer with all terms and conditions of this Agreement, the City and Developer will cooperate reasonably in processing of any permit applications, plans, specifications, plats or other development approvals requested by Developer in connection with development of the Project.

(d) Amendments. The City and Developer acknowledge that amendments to the Site Plans may be necessary from time to time, and such amendments shall in all events be in accordance with the Rules.

(e) Signage. Signage within the Property may be permitted upon approval by the City through the standard City sign processes.

#### 4.2 Development Regulation.

(a) All Rules in effect at the time of development of any portion of the Property shall apply to such development. Subject to Developer's compliance with this Agreement, City agrees that, through Completion of Construction and the earlier of (i) development of the Project or (ii) earlier termination of this Agreement, Developer shall have the right to undertake and complete the development of the Property in accordance with the Zoning as approved with conditions and/or stipulations (the "**Approved Zoning**"). As long as Developer is in full compliance with all the terms of this Agreement and the Rules, City shall not initiate any changes or modifications to the Approved Zoning applicable to any portion of the Property and improvements thereon until after the Completion of Construction and the earlier of (i) development of the Project or (ii) earlier termination of this Agreement, except at the request of the then-owner of such portion of the Property. Further, City agrees that any moratoriums on construction or land development adopted by City before the Completion of Construction and the earlier of (i) development of the Project or (ii) earlier termination of this Agreement shall not apply to the timely construction of the Minimum Improvements and the Project in accordance with this Agreement.

4.3 City Development Fees. The Developer shall pay all then-current City Impact, development and resource fees or exactions, currently in effect or as may be adopted in the future ("**City Development Fees**") in accordance with the Rules.

#### 5. Private Improvements.

5.1 Minimum Improvements. Developer shall construct, or cause to be constructed, the Minimum Improvements on the Property. The Parties agree that Developer shall have no obligation to develop any more of the Project than the Minimum Improvements. Developer will keep the City advised of Developer's specific development plans and provide the City with opportunities for the City's input.

5.2 Commencement of Construction. Commencement of construction of the Minimum Entertainment Improvements ("**Commencement of Construction**") shall occur on or before the sixtieth (60<sup>th</sup>) day following Close of Escrow.

5.3 Completion of Construction. Developer agrees that completion of construction of the Minimum Improvements (“**Completion of Construction**”) shall occur no later than the end of the thirty-second (32<sup>nd</sup>) month following Close of Escrow. The City and Developer shall confirm in writing to the City the date of the Completion of Construction when the same becomes known.

5.4 City Review and Approval of Plans. Developer recognizes that its development and construction of the Private Improvements pursuant to this Agreement are subject to the City’s normal plan submittal, review and approval processes. The City will, as permitted under the Rules, expedite its permit processes (subject to the payment by Developer of all required fees for such expediting), for building permit processes, within the time normally associated with the City’s expedited permit processes then in effect. In this regard, the City may designate one or more of its planning and development staff as primary contact(s) for submittal and review of Developer applications, but shall not be required to dedicate staff exclusively to receipt, review or processing of Developer applications.

5.5 City Improvements. As a condition of development of the Property imposed by the City, the Developer at its sole cost shall design, construct, or cause to be constructed, and dedicate to the City the City Improvements, subject to the terms and conditions of this Agreement and in compliance with the Rules and Applicable Laws.

5.5.1 Design, Bidding, Construction and Dedication. The Public Improvements shall be designed, constructed and dedicated in accordance with the Rules, including, without limitation, the City’s normal plan submittal, review and approval processes, day-to-day inspection requirements, insurance requirements and financial assurance requirements. Additionally, Developer shall comply with all public bid and procurement Rules deemed applicable by the City Attorney with respect to the design and construction of the Minimum Public Improvements for which the Developer seeks reimbursement from Developer.

5.5.2 Payment of Public Improvement Costs. The Developer shall pay all Public Improvement costs as the same become due; provided that City shall be obligated to provide the reimbursement concerning the Minimum Public Improvements as described in Section 8.6.

5.5.3 Dedication, Acceptance and Maintenance of Public Improvements. When the Public Improvements or a discrete portion thereof are completed, then upon written request of the City or the Developer, the Developer shall dedicate and the City shall accept such Public Improvements in accordance with the Rules and upon such reasonable and customary conditions as the City may impose, including, without limitation, a one (1) year workmanship and materials contractor’s warranty in form and content reasonably acceptable to City.

6. Municipal Services and Use of Water on the Property. The City shall provide sewer, fire protection, law enforcement, refuse collection, and other municipal services unrelated to water, to the Property consistent with the Rules and Applicable Laws (including the Applicable Water Laws).

6.1 Developer acknowledges that the Applicable Water Laws may limit or restrict City's ability to provide and Developer's ability to use water for certain uses on the Project, including uses that would be subject to the Lakes Bill (the "**Recreational Water Uses**"). Developer further acknowledges that use of water on the Property and the Project may be subject to conservation and reporting requirements under the Rules, Applicable Laws and Applicable Water Laws.

6.1.1 City's obligation to supply water for the Recreational Water Uses shall be limited solely to providing untreated recovered stored water from City Well #27 (the "**Well Water**") using applicable City storage credits, provided that (i) Developer is in compliance with all Applicable Water Laws and (ii) the City is permitted to supply Well Water to Developer for the Recreational Water Uses pursuant to all Applicable Water Laws. The City's obligation shall be limited to making available for purchase by Developer, up to 400 acre feet per year of the Well Water with a legal classification within the exceptions under the Lakes Bill for the filling or refilling of bodies of water; provided, however, that in the year in which bodies of water used for Recreational Water Uses are initially filled, the City shall make available for purchase by Developer Well Water in sufficient quantity to fill and maintain the water bodies in an amount not to exceed 500 acre feet in that year; and further provided, however, that the City Manager, in his sole discretion and subject to the City's water demands, may agree to sell additional quantities of Well Water with such legal classification. The City shall timely file all necessary forms and applications with ADWR in connection with applicable permitting processes for the withdrawal of stored water from City Well #27 pursuant to applicable City storage credits.

6.1.2 Developer shall secure, equip, operate and maintain the City Well #27 (including but not limited to the well, the well site, and all improvements necessary at the well site [other than metering equipment which shall be operated and maintained by City]) at Developer's sole cost and expense and in accordance and compliance with the Rules and Applicable Water Laws. Any equipment, treatment facilities and other improvements installed on the well site by Developer (the "**Developer Well Improvements**") shall be approved by the City, which approval will not be unreasonably withheld. Developer shall retain sole ownership of all such Developer Well Improvements, and all such Developer Well Improvements, whether or not affixed to the Property, shall remain Developer's personal property, except for the water meters that will become the City's property under Section 6.1.4 herein. Notwithstanding the foregoing, at the expiration or earlier termination of any operating (or similar) agreement entered into by City and Developer with respect to Developer's obligations described in this Section 6.1.2, City may (but is not obligated to) cause Developer to remove the Developer Well Improvements at Developer's sole cost and expense. The Well Water shall be treated, if necessary, by Developer at Developer's sole cost and expense and in accordance and compliance with the Rules and Applicable Water Laws. City may, as determined by the City Manager in his sole discretion, elect to secure, equip, operate and/or maintain City Well #27 and/or treat the water, if necessary, from the Well; provided, however, City shall have no obligation to so elect and may rescind such election upon reasonable notice to Developer.

6.1.3 City makes no guarantee as to the quality of the Well Water and Developer shall, at its sole expense, ensure compliance with all Applicable Water Laws.

6.1.4 Developer shall, at its sole expense, install such number of meters as may be necessary to accurately measure the quantity of Well Water delivered. City shall own, operate, and maintain such meters.

6.1.5 Without the prior written consent of the City, Developer shall not (i) resell any of the Well Water or (ii) use or allow the use of the Well Water upon any property outside the Property.

6.2 For uses that the Applicable Water Laws and Rules allow City to supply potable water, the City shall supply water for the Property from the City's municipal potable distribution system. Developer shall pay all applicable utility fees, costs, and rates and charges as may be in effect from time to time. Developer acknowledges and agrees that all water to the Property and Project shall be obtained from City; provided, however, the Parties agree that if the City is unable to provide a sufficient quantity of water for the Recreational Water Uses from City Well #27, Developer may obtain water for such uses from other permitted sources for such period of time until City is able to provide such water.

6.3 For the Well Water, City Well #27 and Recreational Water Uses, Developer shall, at its sole expense, keep all records of operation, acquire all permits, perform all necessary tests, and submit all necessary reports as may be required of Developer by the Rules, Applicable Laws, and Applicable Water Laws.

6.4 Notwithstanding any other term or provision of this Agreement to the contrary, Developer understands and agrees that all utility services provided to the Property and Project shall be subject to all of the terms, conditions, and limitations contained in the City's Terms and Conditions for the Sale of Utilities, as amended from time to time.

6.5 If Developer constructs the Minimum Improvements and continues to operate the Minimum Improvements, it is the intention of the Parties that the City continue to supply Well Water to Developer beyond the term of this Agreement. To the extent that the City continues to supply Well Water to Developer beyond the term of this Agreement, the obligations and responsibilities of the Parties shall be governed by this Section 6, which shall survive the Term of this Agreement.

7. Additional Municipal Benefits. In addition to the direct, pecuniary, indirect and intangible benefits which the City acknowledges it will realize as a consequence of construction of the Project within the City, including the development of a unique water entertainment facility currently to be found nowhere else in the state of Arizona, thus enhancing the quality of life of the City's residents, and all other commitments of Developer pursuant to this Agreement, Developer agrees to perform, supply or comply with the Additional Municipal Benefits set forth in this Section 7, the covenants, terms and provisions of which shall survive the expiration of the Term of this Agreement. The City agrees and acknowledges that these Additional Municipal Benefits are in addition to those matters that can be compelled or exacted by the City; and confer significant economic and non-economic benefits upon the City in excess of the economic and non-economic benefits conferred by Developer's construction of the Project.

7.1 Prohibited Uses. In addition to any uses prohibited by the Rules, Developer shall prohibit the use of the Property, and the Property shall not be used, for any of the property uses listed on Exhibit E (the “**Prohibited Uses**”) unless hereafter specifically approved by the City Council.

7.2 Access. Developer shall permit access to the Project by the City, its officials, personnel and designees, at reasonable times, subject to reasonable safety requirements as Developer may impose from time to time, to assure compliance with all Rules and terms of this Agreement.

7.3 Radio Coverage. Developer shall cause all improvements to be constructed in such a manner that reasonably facilitates adequate radio coverage for City emergency service workers.

7.4 Emergency Vehicle Access. Developer will grant to the City recorded emergency vehicle access and use easements over and through the entrances to the Project and other private roadways as may exist from time to time within the Project, including without limitation those (if any) shown on the Development Master Plan (the Parties anticipating, however, that the streets serving the Project will all be public streets and rights-of-way).

7.5 Treatment Facility and Park Access. Developer will grant to the City recorded access easements over and through entrances to the Project’s private roadways as may exist from time to time within the Project, and over and through other areas of the Project so as to allow City, its officials, personnel, agents, contractors, and designees access, at all times, to the Treatment Facility and to all well sites located in or around the Property; and Developer further will grant a public access easement to Riverview Park.

7.6 Public Utility and Facility Easements (“PUFE’s”). Developer will grant to City recorded PUFE’s or other utility easements, in a form acceptable to the City, (and allow City to retain existing easements) under, over, and through those portions of the Property that have existing or future public utility improvements.

7.7 Electric, Gas, Water, Cable, Telephone Easements. Developer will grant easements to entities and service providers (by way of example, and including but not limited to, Salt River Project) for electric, gas, water, cable, and telephone improvements under, over, and through those portions of the Property that have such existing improvements.

7.8 General Release and Indemnity of Claims Arising From the Treatment Facility. Developer acknowledges that the Property and the Project are adjacent to the Treatment Facility and that the Treatment Facility may generate, as a normal and expected consequence of its operations, (i) offensive or unusual odors that migrate onto and around the Property and Project, and (ii) noises that have sound levels in excess of 50dba. If, and only if, the Treatment Facility is operated and maintained at a standard equal to or greater than the current operating standard, then Developer, on behalf of itself and its successors and assigns, waives, releases, and forever discharges, and agrees to indemnify, defend, pay and hold harmless, the City, the members of its City Council, its employees, officials, officers or agents, and any other person acting for or on behalf of the City, for, from and against any and all claims, actions, demands,

rights, damages, costs, expenses, or compensation whatsoever, direct or indirect, known or unknown, foreseen or unforeseen, which Developer (including its successors and assigns) now has or which may arise in the future on account of or in any way directly or indirectly, arising from or out of or in connection with: (i) any odors or sounds from the Treatment Facility, and (ii) all effects of and results from any construction activity associated with any future expansion of the Treatment Facility. The release given in this Section 7.8 has been expressly and specifically negotiated by the City and Developer, constitutes specific consideration for the City to have entered into this Agreement with Developer (and without which the City would not have entered into this Agreement) and shall survive the termination of this Agreement.

7.9 Riverview Park and Golf Course. Until the latter of Commencement of Construction or sixty (60) days after the closing of escrow for the Property pursuant to the Land Contract, Developer shall allow the City access on and to the Property (i) to use and operate the softball fields and golf course, and thereafter (ii) to remove park and golf course improvements currently on the Property (such as lights, benches, back stops, park, playground, golf course or other recreational equipment), and City shall be the owner of such removed park and golf course improvements. Notwithstanding the foregoing, the City shall have no obligation to remove any park or golf course improvements; any park or golf course improvements not removed pursuant to this Section shall be owned by Developer.

7.10 Name. In the event that Developer obtains all required approvals for the placement and maintenance of a Freeway Landmark Sign, Developer shall include "Mesa" on such sign (if any), as a geographical location of the Project (but is not required to include Mesa in the name of the Project); provided, however, the City Council may waive this requirement as part of an approval of a Freeway Landmark Sign. When describing where the Project is located in any media, including radio, television, internet, and print advertisement, Developer shall include "Mesa." Developer shall not include in the Project name a geographical location that is not the word "Mesa" unless the prior written approval is obtained from the City Manager, and such approval shall be exercised in his reasonable discretion.

7.11 Use of Project Name. From time to time, the City may use radio, television, internet, and print advertisement, utility bill inserts and City publications to publicize the existence of the Project. Developer agrees to such publicity and to the use in the publicity of the Project name, subject to the Developer's prior review and approval of all such publicity, and such approval not to be unreasonably withheld or delayed.

8. Economic Incentive. The City has determined, that the development of the Project (i) will enhance the economic health of the City; (ii) will result in a net increase or retention of jobs in the City, (iii) will add to the tax base, (iv) will otherwise improve or enhance the welfare of the residents or businesses of the City; (v) would not otherwise occur in the City without these incentives; and (vi) demonstrates the potential to generate revenues and other benefits to the City, which outweigh or are not disproportionate to the costs associated with these incentives. Accordingly, the City shall pay to Developer the Sales Tax Rebates to Developer, in the manner on the terms and conditions and within the timeframe contemplated by this Agreement:

8.1 Sales Tax Rebates. On a monthly basis, the City shall rebate (or credit, as applicable) to Developer an amount (the “**Sales Tax Rebates**”) equal to the Reimbursable Sales Taxes imposed and actually received by the City in connection with the Property for all activities (excluding the taxes from the City’s operation of its golf course or park) taxable under any Transaction Privilege Tax classification, Use Tax, or Transient Occupancy Tax (collectively, the “**Taxable Activities**”), after the Close of Escrow, but limited to the Rebate Period (defined in Section 8.2 below), the Total Economic Incentive (defined in Section 8.1(a) below), and Limitations Due to Anti-Sales Tax Legislation Section (Section 8.1(e)). The Sales Tax Rebates shall be transferred to the City’s Rebate Account and be payable as set forth in this Section 8.1. Notwithstanding the foregoing, until the Note has been paid in full, all Sales Tax Rebates shall be applied or credited to the outstanding balance of the Note and in accordance with the terms of the Note, it being the intent of the Parties that no payment of Sales Tax Rebates be made to Developer until the Note has been paid in full and discharged.

(a) Rebate Account. The City shall transfer the Sales Tax Rebates to a separate account in the City’s general fund, which transfer may (in the City’s election) take the form of a separate or segregated accounting or journal entry (the “**Rebate Account**”). The first deposit into the Rebate Account shall be made after the Close of Escrow and within thirty (30) days following the City’s receipt of the next monthly transaction privilege tax report (the “**Monthly Tax Report**”) that includes Reimbursable Sales Taxes actually received by the City from any of the Taxable Activities, and subsequent deposits shall be made within thirty (30) days following the receipt of each subsequent Monthly Tax Report which includes Reimbursable Sales Taxes actually received by the City from any of the Taxable Activities, until the Total Economic Incentive (as defined below), has been paid and/or credited to Developer, or until the expiration of the Rebate Period (as defined in Section 8.2 below), whichever first occurs. “**Total Economic Incentive**” means the sum of the principal amount due by Developer to City under the Note (i.e., Twenty Million (20,000,000) dollars), plus actual interest (at a rate of 4.4% per annum) accrued, if any, under the terms of such Note.

(b) Conditions Precedent. Developer shall have no rights to payments and/or credits from the Rebate Account, and no payments and/or credits of Sales Tax Rebates shall be made to Developer from the Rebate Account or otherwise, until the Completion of Construction of the Minimum Improvements; and all rights of the Developer to payment and/or credits by the City of Sales Tax Rebates or any other obligation under this Section 8 shall be forfeited by Developer and the City shall be free of any claims by Developer and the City’s obligation to maintain the Rebate Account shall thereupon terminate, if the Completion of Construction of the Minimum Improvements has not occurred for any reason on or before the date set forth in Section 5.3 of this Agreement, or if this Agreement is terminated by the City by reason of an Event of Non-Performance pursuant to Section 12.

(c) Limited Obligations. The City’s obligation to pay or credit the Sales Tax Rebates and any other amounts owing pursuant to this Agreement is limited to payment (or credit) from Reimbursable Sales Taxes received (or deemed received) from Taxable Activities on the Property. Under no circumstances shall any obligation hereunder represent or constitute a general obligation of or pledge of the full faith and credit of the City, the State of Arizona or of any political subdivision thereof, nor require the levy of, or be payable from the proceeds of any ad valorem or other taxes. The obligations to pay, rebate or credit any amount

pursuant to this Agreement shall not constitute an indebtedness of the City, the State of Arizona or any political subdivision thereof within the meaning of any Constitutional or statutory debt limitation or restriction or otherwise. Further, the City shall only be required to make payments of Sales Tax Rebates to not more than two (2) Persons and shall not otherwise be required to account for or make multiple disbursements of Sales Tax Rebates. The City shall make such payments to Developer until and unless Developer advises the City, in writing, of the names of the recipients of the Sales Tax Rebates (if not Developer). The recipients of the Sales Tax Rebates may be a permitted Affiliate of Developer or another permitted transferee designated by Developer (or its permitted successor in interest) but only if such permitted Affiliate or permitted transferee is then one of the two permitted recipients of Sales Tax Rebates under this Agreement. Notwithstanding the foregoing, until the Note has been paid in full, any and all Sales Tax Rebates shall be credited against the sums owing to the City pursuant to the Note, notwithstanding the designation by Developer of other recipients of the Sales Tax Rebates.

(d) Limited Sales Tax Credits on Certain Transactions.

Notwithstanding any provisions of the City Code otherwise applicable to the following taxable transactions, Developer's sales of the Property (or portions of the Property) that would be taxable under the speculative builder or owner-builder transaction privilege tax classifications shall not be eligible for any credits for taxes paid by construction contractors that have been previously deposited into the Rebate Account.

(e) Adjustments Due to Refund or Audit. If during the Term of this Agreement any Reimbursable Sales Taxes previously transferred to the Rebate Account are determined to be encompassed within a granted request for refund, the transfer of the Sales Tax Rebate for the next month(s) following the payment of such refund(s) shall include a reduction to the transfer to the Rebate Account equal to that portion of the refund(s) previously paid into the Rebate Account. If during the Term of this Agreement City audits any taxpayer doing business on the Property and determines that the taxpayer has underpaid any transaction privilege, use, and /or transient occupancy taxes which, if timely paid, would have been included in the calculation of Reimbursable Sales Taxes, then any additional amounts ultimately collected by City during the Term for such taxes shall be included in the calculation of Reimbursable Sales Taxes.

(f) Limitations Due to Anti-Sales Tax Legislation. If due to the terms of this Agreement (such as, but not limited to, the payment or credit of Sales Tax Rebates), the application of any state legislation or other law presently existing or enacted hereafter, would result in reduced state shared revenue to the City or any other financial loss or penalty to the City (a "**Sales Tax Penalty**"), the City shall have no obligation to pay or credit any Sales Tax Rebates that would result in a Sales Tax Penalty, and, notwithstanding any other term or provision of this Agreement to the contrary, Developer shall have no entitlement to any Sales Tax Rebates for any payments that would result in a Sales Tax Penalty. If City pays or credits any amount that it subsequently determines does or would result in a Sales Tax Penalty, Developer shall remit such amounts to City within thirty (30) days of City's request for such amounts.

8.2 Limitations on Payments to Developer. In no event shall any Sales Tax Rebates be payable or credited (i) after the payment of the Total Economic Incentive, or (ii) for any period subsequent to the twenty-fourth (24<sup>th</sup>) anniversary of the Close of Escrow (the

“**Rebate Period**”); provided that, if the Total Economic Incentive has not been paid, any accrued but undisbursed Sales Tax Rebates existing upon expiration of the Rebate Period shall be paid or credited to Developer notwithstanding the fact that receipt thereof by the City and/or such disbursement occurs after the expiration of the Rebate Period. A Sales Tax Rebate shall be deemed to accrue during the Rebate Period if the Taxable Activities from which the Sales Tax Rebate arises occurred during the Rebate Period.

8.3 Determination of Amount of Allocated Revenues Received by the City. The City Manager (or his designee) shall determine in good faith the amount of Sales Tax Rebates for each month (or partial month if applicable) held in the Rebate Account with respect to the Project and report such amount to Developer. If Developer reasonably disputes such determination, Developer may request a review of such determination by the City Manager (or his designee), subject to any Applicable Laws relating to the confidentiality of taxpayer information.

8.4 Computation and Report of Sales Tax Revenues. Within sixty (60) days following the end of each City fiscal year, the City will deliver to Developer a statistical report of all Reimbursable Sales Taxes from Taxable Activities on the Property. Such report shall specifically identify any offsets, credits, exclusions or other deductions from the Reimbursable Sales Taxes generated by or attributable to the Taxable Activities on the Property that have been utilized by the City in computing the Sales Tax Rebates for purposes of this Agreement. Any such report shall be subject to the Rules and Applicable Laws that may prohibit or limit the dissemination or use of the foregoing information required for such report.

8.5 Multiple Business Locations. Since some businesses with multiple locations in the City (a “**Multiple Location Taxpayer**”) report their taxes on the basis of revenues for all their locations in the City, rather than separately for each location, Developer shall request each such Multiple Location Taxpayer that has Taxable Activities on the Property to separately report its taxes to or furnish the City with a certified break out worksheet showing its taxes for its Taxable Activities on the Property, along with the Multiple Location Taxpayer’s name and City privilege tax identification number. In the event that such site-specific information is not supplied by a Multiple Location Taxpayer, then the City Manager’s designee in its sales tax audit department shall reasonably estimate the Taxable Activities on the Property allocable to such Multiple Location Taxpayer, and such estimation shall be final and binding.

8.6 Minimum Public Improvements. If the Completion of Construction of the Minimum Public Improvements occurs on or before the date established in this Agreement for the Completion of Construction, and Developer has complied with all terms of this Agreement, City agrees to reimburse Developer for the cost of the Minimum Public Improvements in an amount not to exceed the lesser of (a) Developer’s actual Costs of Construction of the Minimum Public Improvements, or (ii) one million, five hundred thousand Dollars (\$1,500,000.00), with such reimbursement to be made within ninety (90) days of the City’s receipt of suitable evidence from Developer establishing the payment by Developer of the requested amounts. For the purposes of this Agreement, reimbursable costs of construction of the Minimum Public Improvements shall include all costs, expenses, fees and charges actually incurred and paid by or on behalf of Developer to contractors, architects, engineers, surveyors, governmental agencies and other Third Parties for materials, labor, design, engineering, surveying, site excavation and

preparation, governmental permits, payment and performance bonds, and all other costs and expenses reasonably necessary for the construction, installation, or provision of the Minimum Public Improvements.

9. Indemnity; Risk of Loss.

9.1 Indemnity by Developer. To the extent permitted by law, Developer shall pay, defend, indemnify and hold harmless the City and its City Council members, officers, officials, agents, volunteers, and employees for, from and against any and all claims, demands, fines, penalties, costs, expenses, damages, losses, obligations, judgments, liabilities, and suits (including attorneys fees, experts' fees and court costs associated) which arise from or relate in any way to any act or omission by Developer, or its employees, contractors, subcontractors, agents or representatives, undertaken in fulfillment of Developer's obligations under this Agreement or otherwise arising from or relating to the Project (excluding the Public Improvements following dedication to, and acceptance by, the City for ownership and maintenance). The provisions of this Section 9.1, however, shall not apply to loss or damage or claims therefore which are attributable solely to acts or omissions of the City, its agents, employees, contractors, subcontractors or representatives. The foregoing indemnity obligations of Developer shall survive the expiration or termination of this Agreement for a period equal to the statute of limitations applicable to any potential claim.

9.2 Indemnity by the City. To the extent permitted by law, the City shall pay, defend, indemnify and hold harmless Developer and its Affiliates and their respective partners, shareholders, officers, managers, members, agents and representatives (and their respective partners, shareholders, officers, managers, members, agents or representatives) for, from and against any and all claims, demands, fines, penalties, costs, expenses, damages, losses, obligations, judgments, liabilities and suits (including attorneys' and experts' fees and court costs associated) which arise from or which relate in any way to any negligent act or omission on the part of the City or its employees in connection with construction of Public Improvements. The provisions of this Section 9.2, however, shall not apply to loss or damage or claims therefore which are attributable, in whole or in part, to acts or omissions of Developer and/or its Affiliates, or their respective agents, employees, contractors, subcontractors or representatives. The City shall have no defense obligation in any instance in which a claim is asserted based, in whole or in part, upon an act or omissions of Developer and/or its Affiliates, or their respective employees, contractors, subcontractors, agents or representatives. The foregoing indemnity obligations of the City shall survive the expiration or termination of this Agreement for a period equal to the statute of limitations applicable to any potential claim.

9.3 Risk of Loss. Developer assumes the risk of any and all loss, damage or claims to any portion of the Public Improvements unless and until title to the Public Improvements is transferred (by dedication or otherwise) to the City. At the time title to the Public Improvements is transferred to the City by dedication deed, plat recordation, or otherwise, Developer will, to the extent allowed by law, assign to the City any unexpired warranties relating to the design, construction and/or composition of such Public Improvements. Acceptance of the Public Improvements shall be conditioned on the City's receipt of a one (1) year warranty of workmanship, materials and equipment, in form and content reasonably acceptable to the City, provided however that such warranty or warranties may be provided by Developer's contractor or

contractors directly to the City and are not required from Developer, and that any such warranties shall extend from the date of substantial completion of any Public Improvement, any component thereof, or the work of any specific trade or contractor, as applicable.

9.4 Insurance. During the period of any construction involving the Public Improvements, and with respect to any construction activities relating to the Public Improvements, Developer will obtain and provide the City with proof of payment of premiums, certificates of insurance, and applicable additional insured endorsements showing that Developer is carrying, or causing its contractor(s) to carry, builder's risk insurance, comprehensive general liability and worker's compensation insurance policies in amounts and coverages, and on the terms, set forth on Exhibit F (or other insurance coverage as approved by the City Engineer); and thereafter upon issuance of the first certificate of occupancy for all or any portion of the Improvements and for the Term, Developer shall maintain comprehensive general liability insurance to provide coverage for all of Developer's obligations of indemnity arising under this Agreement in the amounts and coverages, and on the terms, set forth in Exhibit F. Such policies of insurance shall be placed with financially sound and reputable insurers, require the insurer to give at least thirty (30) days advance written notice of cancellation to the City, and will name the City as an additional insured on such policies, as evidenced by endorsement(s) to the policy(ies).

10. City Representations. The City represents and warrants to Developer that:

10.1 Except with respect to the right of the electorate to vote to approve or disapprove the Section 613 Incentives in this Agreement, the City's execution and delivery of this Agreement have been duly authorized and agreed to in compliance with the procedural requirements of the City Code.

10.2 Except with respect to the right of the electorate to vote to approve or disapprove of the Section 613 Incentives in this Agreement, all City consents and approvals necessary to the execution and delivery of this Agreement have been obtained, and no further action needs to be taken in connection with such execution and delivery.

10.3 The City will execute and acknowledge when appropriate all documents and instruments and take all actions necessary to implement, evidence and enforce this Agreement.

10.4 As of the date of this Agreement, the City knows of no litigation, proceeding, initiative, referendum, investigation or threat of any of the same contesting the powers of the City or its officials with respect to this Agreement that has not been disclosed in writing to Developer.

10.5 The City will defend the validity and enforceability of this Agreement in the event of any proceeding or litigation arising from its terms that names the City as a party or which challenges the authority of the City to enter into or perform any of its obligations hereunder and will cooperate with Developer in connection with any other action by a Third Party in which Developer is a party and the benefits of this Agreement to Developer are challenged. The City's obligation shall be limited to defending an action in Maricopa County

Superior Court or the United States District Court for the District of Arizona, as applicable (the “**Trial Court**”), and shall not require City to appeal any decision of the Trial Court.

10.6 The execution and delivery of this Agreement by the City is not prohibited by, and does not conflict with, any other agreements, instruments or judgments or decrees to which the City is a party or is otherwise subject.

10.7 The City has been assisted by counsel of its own choosing in connection with the preparation and execution of this Agreement.

11. Developer Representations. Developer represents and warrants to the City that:

11.1 Developer has the full right, power and authorization to enter into and perform this Agreement and each of the obligations and undertakings of Developer under this Agreement, and the execution, delivery and performance of this Agreement by Developer has been duly authorized and agreed to in compliance with the organizational documents of Developer.

11.2 All consents and approvals necessary to the execution, delivery and performance of this Agreement have been obtained, and no further action needs to be taken in connection with such execution, delivery and performance.

11.3 Developer will execute and acknowledge when appropriate all documents and instruments and take all actions necessary to implement, evidence and enforce this Agreement.

11.4 As of the date of this Agreement, Developer knows of no litigation, proceeding or investigation pending or threatened against or affecting Developer, which could have a material adverse affect on Developer’s performance under this Agreement that has not been disclosed in writing to the City.

11.5 This Agreement (and each undertaking of Developer contained herein) constitutes a valid, binding and enforceable obligation of Developer, enforceable according to its terms, except to the extent limited by bankruptcy, insolvency and other laws of general application affecting creditors’ rights and by equitable principles, whether considered at law or in equity. Developer will defend the validity and enforceability of this Agreement in the event of any proceeding or litigation arising from its terms that names Developer as a party or which challenges the authority of Developer to enter into or perform any of its obligations hereunder and will cooperate with the City in connection with any other action by a Third Party in which the City is a party and the benefits of this Agreement to the City are challenged.

11.6 The execution, delivery and performance of this Agreement by Developer is not prohibited by, and does not conflict with, any other agreements, instruments, judgments or decrees to which Developer is a party or to which Developer is otherwise subject.

11.7 Developer has not paid or given, and will not pay or give, any third party any money or other consideration for obtaining this Agreement other than normal costs of

conducting business and costs of professional services such as the services of architects, engineers and attorneys.

11.8 Developer has been assisted by counsel of its own choosing in connection with the preparation and execution of this Agreement.

12. Events of Non-Performance; Remedies.

12.1 Events of Non-Performance by the Developer. “Non-Performance” or an “Event of Non-Performance” by Developer under this Agreement shall mean one or more of the following:

(a) Any representation or warranty made in this Agreement by Developer was materially inaccurate when made or shall prove to be materially inaccurate during the Term;

(b) Developer fails to comply with the dates established in this Agreement for the Commencement of Construction or the Completion of Construction;

(c) Foreclosure (or deed in lieu of foreclosure) upon any mechanic’s, materialmen’s or other lien on the Property prior to Completion of Construction or upon any improvements on such Property, excluding liens imposed in connection with Developer’s financing or refinancing by Lenders which have entered into nondisturbance agreements with the City in substantially the same form as Exhibit G, but such lien shall not constitute a Non-Performance if Developer deposits in escrow sufficient funds to discharge the lien or otherwise bonds over such liens in a customary fashion;

(d) Developer transfers or attempts to transfer or assign this Agreement in violation of Section 14.2; or

(e) Developer fails to observe or perform any other covenant, obligation or agreement required of it under this Agreement.

12.2 Events of Non-Performance by the City. Non-Performance or an Event of Non-Performance by the City under this Agreement shall mean one or more of the following:

(a) Any representation or warranty made in this Agreement by the City was materially inaccurate when made or shall prove to be materially inaccurate during the Term;

(b) Subject to the terms of Section 8 of this Agreement, the City fails to make Rebate Payments to Developer as provided in this Agreement; or

(c) The City fails to observe or perform any other material covenant, obligation or agreement required of it under this Agreement.

12.3 Grace Periods; Notice and Cure. Except as to the Commencement of Construction or the Completion of Construction, upon the occurrence of an Event of Non-

Performance by any Party, such Party shall, upon written notice from the other Party, proceed immediately to cure or remedy such Non-Performance and, in any event, such Non-Performance shall be cured within thirty (30) days after receipt of such notice; or, if such Non-Performance is of a nature not capable of being cured within thirty (30) days the cure shall be commenced within such period and diligently pursued to completion in a period not to exceed ninety (90) days. This section shall not apply, and there shall not be any grace period or requirement of notice and opportunity to cure, with respect to Developer's obligations that are required to be completed or performed by the Commencement of Construction or by the Completion of Construction.

12.4 Consequences of Non-Performance. Whenever any Event of Non-Performance occurs, the other Party may take any of one or more of the following actions:

(a) Remedies of the City. The City's exclusive remedies for an Event of Non-Performance by Developer shall consist of, and shall be limited to the following:

(i) If the Event of Non-Performance is subject to the notice and cure provisions under Section 12.3 and is not cured within the time required by this section, the City may suspend any of its obligations under this Agreement or it may terminate this Agreement by written notice thereof to Developer, in which event the Rebate Account also shall terminate and all Reimbursable Sales Taxes shall be property of the City free of any claims by or interests of Developer.

(ii) If the Event of Non-Performance is not subject to the notice and cure provisions under Section 12.3, City may terminate this Agreement by written notice thereof to Developer, in which event the Rebate Account also shall terminate and all Reimbursable Sales Taxes shall be property of the City free of any claims by or interests of Developer.

(iii) At any time, the City may seek special action or other similar relief (whether characterized as mandamus, injunction or otherwise), requiring Developer to undertake and to fully and timely perform its obligations under this Agreement, including, but not limited to, timely address a public safety concern or to enjoin any construction or activity undertaken by Developer that is not in accordance with the terms of this Agreement.

(iv) Nothing in this Agreement shall be deemed to limit the City's administrative remedies or the remedies and/or penalties provided under the Rules.

(v) Nothing in this agreement shall limit or be deemed to limit any of the City's rights and remedies arising under the Note or Deed of Trust, including rights of foreclosure, damages, etc.

(b) Remedies of Developer. Whenever any Event of Non-Performance occurs and is not cured (or cure undertaken) by the City in accordance with Section 12.3 of this Agreement, Developer's exclusive remedies for an Event of Non-Performance by the City shall consist of and shall be limited to the following:

(i) Recovery of damages for unpaid amounts due in accordance with the provisions of this Agreement, particularly Section 8. Such damages shall consist of Developer's actual damages as of the time of entry of judgment (meaning only the right to receive payments or credits from the Rebate Account). Developer waives any right to seek consequential, punitive, multiple, exemplary or any other damages of any kind or nature.

(ii) Notwithstanding any other provision of this Agreement to the contrary, if an Event of Non-Performance by the City occurs at any time, whether prior to or after Completion of Construction, Developer may seek special action or other similar relief (whether characterized as mandamus, injunction or otherwise), requiring the City to undertake and to fully and timely perform its obligations under this Agreement, including, but not limited to, the allocation and credit of Sales Tax Rebates to Developer in accordance with the terms of this Agreement.

12.5 Delays; Waivers. Except as otherwise expressly provided in this Agreement, any delay by any Party in asserting any right or remedy under this Agreement shall not operate as a waiver of any such rights or limit such rights in any way; and any waiver in fact made by such Party with respect to any Event of Non-Performance by the other Party shall not be considered as a waiver of rights with respect to any other Event of Non-Performance by the performing Party or with respect to the particular Event of Non-Performance except to the extent specifically waived in writing. It is the intent of the Parties that this provision will enable each Party to avoid the risk of being limited in the exercise of any right or remedy provided in this Agreement by waiver, laches or otherwise at a time when it may still hope to resolve the problems created by the Event of Non-Performance involved.

12.6 Enforced Delay in Performance for Causes Beyond Control of Party. Whether stated or not, all periods of time in this Agreement are subject to this Section (except for the dates established for Commencement of Construction and Completion of Construction, the expiration of the Rebate Period, and the due dates for the Sales Tax Rebates to be credited by the City to Developer). Neither the City nor Developer, as the case may be, shall be considered to have caused an Event of Non-Performance with respect to its obligations under this Agreement in the event of enforced delay (an "**Enforced Delay**") due to causes beyond its control (and without its fault, negligence or failure to comply with the Rules), including, but not restricted to, acts of God, acts of public enemy, acts of the Federal Government, state acts of the other Party, acts of a Third Party, litigation concerning the validity and enforceability of this Agreement or relating to transactions contemplated hereby (including the effect of petitions for initiative or referendum), fires, floods, epidemics, quarantine, restrictions, act of a public enemy, war, terrorism or act of terror (including but not limited to bio-terrorism or eco-terrorism), nuclear radiation, blockade, insurrection, riot, labor strike or interruption, extortion, sabotage, or similar occurrence, or declaration of moratorium or similar hiatus directly affecting the Property (whether permanent or temporary) by any public, quasi-public or private entity. In no event will Enforced Delay include any delay resulting from general economic or market conditions, unavailability for any reason of particular tenants or purchasers of portions of the Project, nor from the unavailability for any reason of particular contractors, subcontractors, vendors, investors or lenders desired by Developer in connection with the Project, it being agreed that Developer will bear all risks of delay which are not Enforced Delay. In the event of the occurrence of any such Enforced Delay, the time or times for performance of the obligations of

the Party claiming delay shall be extended for a period of the Enforced Delay; provided that the Party seeking the benefit of the provisions of this Section 12.6 shall, within thirty (30) days after such Party knows of any such Enforced Delay, first notify the other Party of the specific delay in writing and claim the right to an extension for the period of the Enforced Delay; provided, however, that either Party's failure to notify the other of an event constituting an Enforced Delay shall not alter, detract from or negate its character as an Enforced Delay if such event of Enforced Delay were not known or reasonably discoverable by such Party; and further provided that in no event shall any cause or circumstance provide a period of Enforced Delay in excess of sixty (60) calendar days.

12.7 Rights and Remedies Cumulative. The rights and remedies of the Parties are cumulative, and the exercise by either Party of any one or more of such rights shall not preclude the exercise by it, at the same or different times, of any other right or remedy for any other Event of Non-Performance by the other Party.

13. Cooperation.

13.1 Representatives. To further the cooperation of the Parties in implementing this Agreement, the City and Developer each shall from time to time designate and appoint a representative to act as a liaison between the City and its various departments and Developer. The initial representative for the City shall be the City Manager or such other person designated by the City Manager (the "**City Representative**") and the initial representative for Developer shall be its Project manager (the "**Developer Representative**"). The City's and Developer's Representatives shall be available at all reasonable times to discuss and review the performance of the Parties to this Agreement and the development of the Property.

14. Miscellaneous Provisions.

14.1 Governing Law; Choice of Forum. This Agreement shall be deemed to be made under, shall be construed in accordance with, and shall be governed by the internal, substantive laws of the State of Arizona (without reference to conflict of law principles). Any action brought to interpret, enforce or construe any provision of this Agreement shall be commenced and maintained in the Superior Court of the State of Arizona in and for the County of Maricopa (or, as may be appropriate, in the Justice Courts of Maricopa County, Arizona, or in the United States District Court for the District of Arizona, if, but only if, the Superior Court lacks or declines jurisdiction over such action). The Parties irrevocably consent to jurisdiction and venue in such courts for such purposes and agree not to seek transfer or removal of any action commenced in accordance with the terms of this Section 14.1.

14.2 Restrictions on Assignment and Transfer.

14.2.1 Definitions. For purposes of Section 14.2 of this Agreement, the following terms shall have the meanings ascribed to them below:

- (a) "Developer Control Group" means all of the Affiliates of Waveyard Development, LLC;

(b) “Transfer” means a transfer or assignment of all or part of the rights or obligations of any person under this Agreement;

(c) “Control” means the power to control the management and policies of a person, as a result of stock or membership interest ownership, operating agreement provisions, management agreement or otherwise; and

(d) “Transfer Notice” means a prior written notice to be delivered to City not less than fifteen (15) days in advance of certain Transfers, describing the rights, obligations and/or interests to be transferred or assigned and providing the name and address of the transferee.

14.2.2 Restriction on Transfers. Except as provided in this Section 14.2, prior to Completion of Construction, no Transfer shall occur without the prior written consent of City, which consent may be given or withheld in the City’s sole and unfettered discretion. The restrictions set forth in Section 14.2 of this Agreement shall terminate automatically, and without further notice or action, upon Completion of Construction. Any Transfer by Developer of its rights under this Agreement in violation of the restrictions set forth in this Article 14 shall be null and void, and not voidable.

14.2.3 Exclusions/Permitted Transfers. The restriction on Transfer set forth in Section 14.2.2 of this Agreement shall not apply to the following:

(a) any sale or assignment of any interest in Developer if Control of Developer and ownership of not less than fifty-one percent (51%) of the total ownership interests in Developer remains in the Developer Control Group;

(b) the exercise of remedies by any Lender referred to in Section 14.21 of this Agreement, which Lender has entered into a non-disturbance agreement with the City; or

(c) a pledge, collateral assignment, encumbrance or similar financing or refinancing transaction (including, without limitation, assignment of any right to receive any payment or reimbursement from the City under this Agreement) to any Lender which provides acquisition, construction, permanent, working capital, tenant improvement or other financing, directly or indirectly, to Developer for all or any part of the Property.

14.2.4 Notice of Transfer. Developer shall provide a Transfer Notice to City with respect to:

(a) any planned sale or assignment of any interest in Developer which results in (i) ownership of less than fifty-one percent (51%) of the total ownership interests in Developer being held by the Developer Control Group, or (ii) Control of the Developer not being held by the Developer Control Group.

(b) any Transfer referred to in Section 14.2.3(c) or (d) of this Agreement.

14.2.5 Transfers by City. The City's rights and obligations under this Agreement shall be non-assignable and non-transferable, without the prior express written consent of Developer, which consent may be given or withheld in Developer's sole and unfettered description.

14.3 Limited Severability. The City and Developer each believe that the execution, delivery and performance of this Agreement are in compliance with all Rules. However, in the unlikely event that any provision of this Agreement is declared void or unenforceable (or is construed as requiring the City to do any act in violation of any Rules, constitutional provision, law, regulation, City code or City charter), such provision shall be deemed severed from this Agreement and this Agreement shall otherwise remain in full force and effect.

14.4 Construction. The terms and provisions of this Agreement represent the results of negotiations between the Parties, each of which has been or has had the opportunity to be represented by counsel of its own choosing, and none of which has acted under any duress or compulsion, whether legal, economic or otherwise. Consequently, the terms and provisions of this Agreement shall be interpreted and construed in accordance with their usual and customary meanings, and the Parties each hereby waive the application of any rule of law which would otherwise be applicable in connection with the interpretation and construction of this Agreement that ambiguous or conflicting terms or provisions contained in this Agreement shall be interpreted or construed against the Party who prepared or whose attorney prepared the executed Agreement or any earlier draft of the same.

14.5 Notices.

(a) Addresses. Except as otherwise required by law, any notice required or permitted under this Agreement shall be in writing and shall be given by personal delivery, or by deposit in the United States mail, certified or registered, return receipt requested, postage prepaid, addressed to the Parties at their respective addresses set forth below, or at such other address as a Party may designate in writing pursuant to the terms of this Section, or by telecopy facsimile machine, or by any nationally recognized express or overnight delivery service (e.g. Federal Express or UPS), delivery charges prepaid:

If to the City:

City of Mesa  
Attn: City Manager  
20 E. Main Street  
Mesa, Arizona 85211  
Telephone: (480) 644-2066  
Facsimile: (480) 644-2175

With required copies to:

City of Mesa  
Attn: City Attorney  
20 E. Main Street  
Mesa, Arizona 85211  
Telephone: (480) 644-2343  
Facsimile: (480) 644-2498

and

Mariscal, Weeks, McIntyre & Friedlander, P.A.  
Attn: Gary L. Birnbaum, Esq.  
2901 North Central, Suite 200  
Phoenix, Arizona 85012  
Telephone: (602) 258-5009  
Facsimile: (602) 258-5100

If to Developer:

Waveyard Development, LLC  
Attn: Jerry Hug and Richard Mladick  
8912 E. Pinnacle Peak Road, Suite F9-664  
Scottsdale, Arizona 85255  
Telephone: (480) 563-8881  
Facsimile: (480) 342-8886

With required copies to:

Gallagher & Kennedy, P.A.  
Attn: Dana Staggs Belknap, Esq.  
2575 E. Camelback Road  
Phoenix, Arizona 85016  
Telephone: (602) 530-8348  
Facsimile: (602) 530-8500

(b) Effective Date of Notices. Any notice sent by United States Postal Service certified or registered mail shall be deemed to be effective the earlier of the actual delivery, or three (3) business days after deposit in a post office operated by the United States Postal Service. Any notice sent by a recognized national overnight delivery service shall be deemed effective one (1) business day after deposit with such service. Any notice personally delivered or delivered through a same-day delivery/courier service shall be deemed effective upon its receipt or refusal to accept receipt by the addressee. Any notice sent by telecopy facsimile machine shall be deemed effective upon confirmation of the successful transmission by the sender's telecopy facsimile machine. Notwithstanding the foregoing, no payment shall be deemed to be made until actually received in good and available funds by the intended payee. Any Party may designate a different person or entity or change the place to which any notice shall be given as herein provided.

(c) Payments. Payments, if any, shall be made and delivered in the same manner as Notices; provided, however, that payments shall be deemed made only upon actual receipt by the intended recipient.

14.6 Time of Essence. Time is of the essence of this Agreement and each provision hereof.

14.7 Section Headings. The Section headings contained in this Agreement are for convenience in reference only and are not intended to define or limit the scope of any provision of this Agreement.

14.8 Attorneys' Fees and Costs. In the event of a breach by any Party and commencement of a subsequent legal action in an appropriate forum, the prevailing Party in any such dispute shall be entitled to reimbursement of its reasonable attorney's fees and court costs, including, but not limited to, its costs of expert witnesses, transportation, lodging and meal costs of the parties and witnesses, costs of transcript preparation and other reasonable and necessary direct and incidental costs of such dispute.

14.9 Waiver. Without limiting the provisions of Section 12.5 of this Agreement, the Parties agree that neither the failure nor the delay of any Party to exercise any right, remedy, power or privilege under this Agreement shall operate as a waiver of such right, remedy, power or privilege, nor shall any single or partial exercise of any right, remedy, power or privilege preclude any other or further exercise of the same or of any other right, remedy, power or privilege, nor shall any waiver of any right, remedy, power or privilege with respect to any occurrence be construed as a waiver of such right, remedy, power or privilege with respect to any other occurrence. No waiver shall be effective unless it is in writing and is signed by the Party asserted to have granted such waiver.

14.10 Third Party Beneficiaries. No person or entity shall be a third party beneficiary to this Agreement, except for permitted transferees, assignees, or lenders under Section 14.2 to the extent that they assume or succeed to the rights and/or obligations of Developer under this Agreement, and except that the indemnified Parties referred to in the indemnification provisions of Sections 9.1 and 9.2 (or elsewhere in this Agreement) shall be third party beneficiaries of such indemnification provisions.

14.11 Exhibits. Without limiting the provisions of Section 1 of this Agreement, the Parties agree that all references to this Agreement include all Exhibits designated in and attached to this Agreement, such Exhibits being incorporated into and made an integral part of this Agreement for all purposes.

14.12 Integration. Except as expressly provided herein, this Agreement constitutes the entire agreement between the Parties with respect to the subject matters hereof and supersedes any prior agreement, understanding, negotiation or representation regarding the subject matters covered by this Agreement.

14.13 Further Assurances. Each Party agrees to perform such other and further acts and to execute and deliver such additional agreements, documents, affidavits, certifications, acknowledgments and instruments as any other Party may reasonably require to consummate, evidence, confirm or carry out the matters contemplated by this Agreement or confirm the status of (a) this Agreement as in full force and effect and (b) the performance of the obligations hereunder at any time during its Term.

14.14 Business Days. If the last day of any time period stated in this Agreement or the date on which any obligation to be performed under this Agreement shall fall on a Saturday, Sunday or legal holiday, then the duration of such time period or the date of performance, as applicable, shall be extended so that it shall end on the next succeeding day which is not a Saturday, Sunday or legal holiday.

14.15 Consents and Approvals. Wherever this Agreement requires or permits the consent or approval of a Party to any act, document, use or other matter, such consent or approval shall be given or denied by such Party in its reasonable discretion, unless this Agreement expressly provides otherwise.

14.16 Covenants Running With Land; Inurement. The covenants, conditions, terms and provisions of this Agreement relating to use of the Property shall run with the Property and shall be binding upon, and shall inure to the benefit of the Parties and their respective permitted successors and assigns with respect to such Property. Wherever the term "Party" or the name of any particular Party is used in this Agreement such term shall include any such Party's permitted successors and assigns.

14.17 Recordation. Within ten (10) days after this Agreement has been approved by the City and executed by the Parties, the City shall cause this Agreement to be recorded in the Official Records of Maricopa County, Arizona.

14.18 Amendment. No change or addition is to be made to this Agreement except by written amendment executed by the City and Developer. Within ten (10) days after any amendment to this Agreement, such amendment shall be recorded in the Official Records of Maricopa County, Arizona. Upon amendment of this Agreement as established herein, references to "Agreement" or "Development Agreement" shall mean the Agreement as amended by any subsequent, duly processed amendment. The effective date of any duly processed amendment shall be the date on which the last representative for the Parties executes the Agreement. If, after the effective date of any amendment(s), the parties find it necessary to refer to this Agreement in its original, unamended form, they shall refer to it as the "Original Development Agreement." When the Parties mean to refer to any specific amendment to the Agreement which amendment is unmodified by any subsequent amendments, the Parties shall refer to it by the number of the amendment as well as its effective date.

14.19 Good Faith of Parties. Except where any matter is expressly stated to be in the sole discretion of a Party, in performance of this Agreement or in considering any requested extension of time, the Parties agree that each will act in good faith and will not act unreasonably, arbitrarily or capriciously and will not unreasonably withhold, delay or condition any requested approval, acknowledgment or consent.

14.20 Survival. All indemnifications and general releases contained in Sections 7.8, 9.1 and 9.2 of this Agreement shall survive the execution and delivery of this Agreement, the closing of any transaction contemplated herein, and the rescission, cancellation, expiration or termination of this Agreement upon the terms and for the period set forth in each respective Section.

14.21 Rights of Lenders. The City is aware that Developer may obtain financing or refinancing for acquisition, development and/or construction of the real property and/or improvements to be constructed on the Property, in whole or in part, from time to time, by one or more Third Parties (individually a "**Lender**", and collectively the "**Lenders**"). In the event of an Event of Non-Performance by Developer, the City shall provide notice of such Event of Non-Performance, at the same time notice is provided to Developer, to not more than two (2) of such

Lenders as previously designated by Developer to receive such notice (the “**Designated Lenders**”) whose names and addresses were provided by written notice to the City in accordance with Section 14.5. The City shall give Developer copies of any such notice provided to such Designated Lenders and, unless Developer notifies the City that the Designated Lenders names or addresses are incorrect (and provides the City with the correct information) within three (3) business days after Developer receives its copies of such notice from the City, the City will be deemed to have given such notice to the Designated Lenders even if their names or addresses are incorrect. Developer may provide notices to other Lenders. If a Lender is permitted, under the terms of its nondisturbance agreement with the City to cure the Event of Non-Performance and/or to assume Developer’s position with respect to this Agreement, the City agrees to recognize such rights of the Lender and to otherwise permit the Lender to assume all of the rights and obligations of Developer under this Agreement. The City shall, at any time upon reasonable request by Developer, provide to any Lender an estoppel certificate or other document evidencing that this Agreement is in full force and effect and that no Event of Non-Performance by Developer exists hereunder (or, if appropriate, specifying the nature and duration of any existing Event of Non-Performance). Upon request by a Lender, the City will enter into a separate nondisturbance agreement with such Lender, consistent with the provisions of this Section 14.21.

14.22 Pad Sites. If at any time during the Rebate Period, any pads, lots or other portions of the Property are sold by Developer (the “**Pad Sites**”) the Reimbursable Sales Taxes from Taxable Activities on those Pad Sites shall be included in the computation of Reimbursable Sales Taxes for purposes of this Agreement, and the development of such Pad Sites shall be subject to the same Design Guidelines and Rules which apply to the remainder of the Project owned by Developer.

14.23 Nonliability of City Officials, Etc., and of Employees, Members and Partners, Etc. of Developer. No City Council member, official, representative, agent, attorney or employee of the City shall be personally liable to any of the other Parties hereto, or to any successor in interest to any of the other Parties, in the event of any Non-Performance or breach by the City or for any amount which may become due to any of the other Parties or their successors, or with respect to any obligation of the City under the terms of this Agreement. Notwithstanding anything contained in this Agreement to the contrary, the liability of Developer under this Agreement shall be limited solely to the assets of Developer and shall not extend to or be enforceable against: (i) the individual assets of any of the individuals or entities who are shareholders, members, managers, constituent partners, officers or directors of the general partners or members of Developer; (ii) the shareholders, members or managers or constituent partners of Developer; or (iii) officers of Developer.

14.24 Proposition 207 Waiver. Developer hereby waives and releases the City from any and all claims under Arizona Revised Statutes § 12-1134, et seq., including any right to compensation for reduction to the fair market value of the Property, that may now or in the future exist as a result of, or that arises out of this Agreement, the Zoning, and any site plan, plat or other development approval sought by Developer for the development of the Project or the Minimum Improvements. The terms of this Waiver shall run with the land and shall be binding upon all subsequent landowners and shall survive the expiration or earlier termination of this Agreement.

14.25 Compliance with Existing Laws. All references in the Agreement requiring Developer to comply with (develop in accordance with, done in accordance with, or phrases with similar intent) any codes, processes, permit requirements, Rules, Applicable Laws, and/or Applicable Water Laws (collectively, "Requirements") shall mean those Requirements in effect at the time of the requested approval, unless specifically stated to the contrary in this Agreement or unless the application of this section would result in a violation of the Requirement.

14.26 Conflict of Interest Statute. This Agreement is subject to, and may be terminated by the City in accordance with, the provisions of A.R.S. §38-511.

14.27 Developer Reimbursement of City's Attorney Fees. Upon and after the execution of this Agreement by the Parties, Developer, promptly and following written demand by the City, shall reimburse the City for fees (and related costs and expenses) paid and/or incurred by the City to its outside legal counsel in connection with the negotiation and drafting of this Agreement (including the drafting of exhibits and such outside counsel's involvement in related matters up through and including the time of the Election), with the total of such reimbursement(s) not to exceed \$75,000.00.

14.28 Developer Reimbursement of City Expenses for Election. Developer, promptly and following written demand by the City, shall reimburse the City for all expenses incurred by the City in connection with the Election, including but not limited to advertising costs, costs of preparing and printing ballots, etc. As a preliminary reimbursement, Developer shall pay to the City, on or before October 1, 2007, the sum of Two Hundred and Fifty Thousand and no/100 Dollars (\$250,000.00). If the cost of the Election to the City exceeds \$250,000.00, then Developer shall reimburse such additional amounts to the City immediately upon demand; and if the cost of the Election to the City is less than \$250,000.00, the City shall return any excess amount paid by Developer promptly upon the City's determination of its actual Election expense. There is no "cap" on the amount of such reimbursement, and Developer's obligation of reimbursement is not dependent upon the outcome of the Election and shall survive the termination of this Agreement for any reason, including but not limited to the failure of the Section 613 Incentives to have been approved in the Election. In the event that Developer fails to reimburse the City for the expense of the Election as required by this Section 14.28, in addition to any other remedy that the City may have against Developer to recover the expense of the Election, the City may reduce Developer's entitlement to Sales Tax Rebates by the amount of such expense.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first set forth above.

WAVEYARD DEVELOPMENT, LLC, a Delaware  
limited liability company ("Developer")

By: \_\_\_\_\_  
Jerry Hug, Manager

By: \_\_\_\_\_  
Richard Mladick, Manager

CITY OF MESA, ARIZONA, an Arizona  
municipal corporation ("City")

By: \_\_\_\_\_  
Its: \_\_\_\_\_

ATTEST:

By: \_\_\_\_\_  
City Clerk

APPROVED AS TO FORM

By: \_\_\_\_\_  
City Attorney

STATE OF ARIZONA       )  
  ) ss.  
COUNTY OF MARICOPA   )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2007, by \_\_\_\_\_, City \_\_\_\_\_ of the City of Mesa, Arizona, an Arizona municipal corporation, who acknowledged that he/she signed the foregoing instrument on behalf of the City.

\_\_\_\_\_  
Notary Public

My commission expires:

\_\_\_\_\_

=====

STATE OF \_\_\_\_\_)  
  ) ss.  
COUNTY OF \_\_\_\_\_)

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2007, by Jerry Hug and Richard Mladick, the Managers of Waveyard Development, LLC, a Delaware limited liability company.

\_\_\_\_\_  
Notary Public

My commission expires:

\_\_\_\_\_

**EXHIBIT A**  
**LEGAL DESCRIPTION OF THE PROPERTY**

**EXHIBIT "A"**  
**WAVEYARD**  
**PRELIMINARY PROJECT BOUNDARY**

THAT PART OF THE SOUTHEAST QUARTER OF THE NORTHEAST QUARTER OF SAID 18 AND THAT PART OF THE NORTHEAST QUARTER OF THE SOUTHEAST QUARTER OF SAID SECTION 18 AND THAT PART OF THE NORTHEAST QUARTER OF THE NORTHEAST QUARTER OF SECTION 18 AND THAT PART OF THE NORTHWEST QUARTER OF SECTION 18 AND THAT PART OF THE SOUTHWEST QUARTER OF THE NORTHEAST QUARTER OF SECTION 18 AND THAT PART OF THE NORTHWEST QUARTER OF SECTION 17 DESCRIBED AS FOLLOWS, THE COURSES GIVEN BEING BASED ON AN ASSUMED COURSE OF EAST FOR THE SOUTH LINE OF THE SOUTHEAST QUARTER OF SAID SECTION 18, TO-WIT:

**BEGINNING** AT THE EAST QUARTER SECTION CORNER OF SAID SECTION 18;

**THENCE** NORTH 0 DEGREES 56 MINUTES 23 SECONDS EAST ALONG THE SECTION LINE 45.01 FEET;

**THENCE** IN A WESTERLY DIRECTION SOUTH 89 DEGREES 29 MINUTES 09 SECONDS 1091.82 FEET TO A **POINT OF BEGINNING**;

**THENCE** IN A WESTERLY DIRECTION SOUTH 89 DEGREES 27 MINUTES 09 SECONDS WEST 1587.39 FEET;

**THENCE** IN A WESTERLY DIRECTION SOUTH 89 DEGREES 25 MINUTES 46 SECONDS WEST 1613.72 FEET;

**THENCE** IN A NORTHERLY DIRECTION NORTH 01 DEGREES 40 MINUTES 11 SECONDS WEST 293.12 FEET;

**THENCE** IN A WESTERLY DIRECTION SOUTH 89 DEGREES 30 MINUTES 34 SECONDS WEST 378.63 FEET;

**THENCE** IN A WESTERLY DIRECTION SOUTH 89 DEGREES 30 MINUTES 34 SECONDS WEST 26.21 FEET;

**THENCE** IN A NORTHEASTERLY DIRECTION NORTH 33 DEGREES 15 MINUTES 30 SECONDS EAST 261.71 FEET;

**THENCE** IN A NORTHEASTERLY DIRECTION NORTH 13 DEGREES 48 MINUTES 16 SECONDS EAST 286.14 FEET;

**THENCE** IN A NORTHEASTERLY DIRECTION NORTH 64 DEGREES 23 MINUTES 35 SECONDS EAST 665.74 FEET;

**THENCE** IN A NORTHEASTERLY DIRECTION NORTH 60 DEGREES 21 MINUTES 57 SECONDS EAST 428.51 FEET;

**THENCE** IN A NORTHEASTERLY DIRECTION NORTH 76 DEGREES 38 MINUTES 49 SECONDS EAST 220.72 FEET;

**THENCE** IN A NORTHEASTERLY DIRECTION NORTH 63 DEGREES 27 MINUTES 32 SECONDS EAST 435.15 FEET;

**THENCE** IN A EASTERLY DIRECTION NORTH 87 DEGREES 50 MINUTES 34 SECONDS EAST 231.33 FEET;

**THENCE** IN A SOUTHERLY DIRECTION SOUTH 00 DEGREES 16 MINUTES 13 SECONDS EAST 256.64 FEET;

**THENCE** IN A EASTERLY DIRECTION NORTH 89 DEGREES 43 MINUTES 47 SECONDS EAST 255.62 FEET;

**THENCE** IN A EASTERLY DIRECTION SOUTH 79 DEGREES 45 MINUTES 07 SECONDS EAST 110.05 FEET;

**THENCE** IN A EASTERLY DIRECTION NORTH 89 DEGREES 43 MINUTES 47 SECONDS EAST 1288.80 FEET;

**THENCE** IN A NORTHERLY DIRECTION NORTH 00 DEGREES 19 MINUTES 56 SECONDS EAST 765.59 FEET;

**THENCE** IN A NORTHEASTERLY DIRECTION NORTH 72 DEGREES 12 MINUTES 48 SECONDS EAST 982.53 FEET;

**THENCE** IN A SOUTHERLY DIRECTION SOUTH 00 DEGREES 58 MINUTES 08 SECONDS WEST 171.42 FEET;

**THENCE** IN A EASTERLY DIRECTION SOUTH 89 DEGREES 03 MINUTES 28 SECONDS EAST 130.08 FEET;

**THENCE** IN A SOUTHERLY DIRECTION SOUTH 00 DEGREES 56 MINUTES 23 SECONDS WEST 771.68 FEET;

**THENCE** IN A SOUTHWESTERLY DIRECTION SOUTH 65 DEGREES 24 MINUTES 15 SECONDS WEST 1258.05 FEET;

**THENCE** IN A SOUTHERLY DIRECTION SOUTH 02 DEGREES 03 MINUTES 07 SECONDS EAST 837.33 FEET TO THE **POINT OF BEGINNING**.

#### **LEASED PROPERTY**

**BEGINNING** AT THE EAST QUARTER SECTION CORNER OF SAID SECTION 18;

**THENCE** IN A WESTERLY DIRECTION SOUTH 89 DEGREES 29 MINUTES 09 SECONDS WEST ALONG THE SOUTH LINE OF MID SECTION LINE 1039.12 FEET;

**THENCE** DEPARTING SAID MID SECTION LINE IN A NORTHERLY DIRECTION NORTH 00 DEGREES 19 MINUTES 56 SECONDS EAST 1284.34 FEET TO A **POINT OF BEGINNING**;

**THENCE** IN A WESTERLY DIRECTION SOUTH 89 DEGREES 43 MINUTES 47 SECONDS WEST 340.65 FEET;

**THENCE** IN A NORTHERLY DIRECTION NORTH 00 DEGREES 06 MINUTES 05 SECONDS EAST 38.83 FEET;

**THENCE** IN A NORTHERLY DIRECTION NORTH 13 DEGREES 46 MINUTES 36 SECONDS WEST 35.97 FEET;

**THENCE** IN A EASTERLY DIRECTION NORTH 76 DEGREES 13 MINUTES 24 SECONDS EAST 1.57 FEET;

**THENCE** IN A NORTHEASTERLY DIRECTION NORTH 25 DEGREES 05 MINUTES 21 SECONDS EAST 32.12 FEET;

**THENCE** IN A EASTERLY DIRECTION NORTH 77 DEGREES 45 MINUTES 49 SECONDS EAST 1.72 FEET;

**THENCE** IN A NORTHERLY DIRECTION NORTH 12 DEGREES 14 MINUTES 11 SECONDS WEST 38.15 FEET;

**THENCE** IN A NORTHERLY DIRECTION NORTH 00 DEGREES 06 MINUTES 05 SECONDS EAST 493.23 FEET;

**THENCE** IN A EASTERLY DIRECTION NORTH 88 DEGREES 40 MINUTES 32 SECONDS EAST 43.91 FEET TO A POINT OF INTERSECTION WITH A CURVE CONCAVE TO THE NORTH;

**THENCE** NORTHEASTERLY, 25.51 FEET ALONG THE ARC OF SAID CURVE, SAID CURVE HAVING A RADIUS OF 100.00 FEET, A CENTRAL ANGLE OF 14 DEGREES 36 MINUTES 54 SECONDS AND A CHORD THAT BEARS NORTH 81 DEGREES 22 MINUTES 05 SECONDS EAST A DISTANCE OF 25.44 FEET;

**THENCE** IN A EASTERLY DIRECTION NORTH 74 DEGREES 03 MINUTES 38 SECONDS EAST 76.50 FEET TO A POINT OF INTERSECTION WITH A CURVE CONCAVE TO THE SOUTHEAST;

**THENCE** EASTERLY, 29.98 FEET ALONG THE ARC OF SAID CURVE, SAID CURVE HAVING A RADIUS OF 112.00 FEET, A CENTRAL ANGLE OF 15 DEGREES 20 MINUTES 12 SECONDS AND A CHORD THAT BEARS NORTH 81 DEGREES 43 MINUTES 44 SECONDS EAST A DISTANCE OF 29.89 FEET;

**THENCE** IN A EASTERLY DIRECTION NORTH 89 DEGREES 23 MINUTES 50 SECONDS EAST 52.68 FEET;

**THENCE** IN A NORTHERLY DIRECTION NORTH 00 DEGREES 36 MINUTES 10 SECONDS WEST 63.88 FEET;

**THENCE** IN A EASTERLY DIRECTION NORTH 72 DEGREES 10 MINUTES 19 SECONDS EAST 125.81 FEET;

**THENCE** IN A SOUTHERLY DIRECTION SOUTH 00 DEGREES 19 MINUTES 56 SECONDS WEST 765.59 FEET TO THE **POINT OF BEGINNING**.

**PROPERTY LINE SKETCH  
OF EXHIBIT 'A'**

DATE: 05-30-2007	SHEET 1 OF 1 NOT TO SCALE
---------------------	------------------------------

NORTH WEST CORNER OF  
SECTION 18, T.1N.,R.5E

NORTH EAST CORNER OF  
SECTION 18, T.1N.,R.5E

LEASE PROPERTY  
5.3 ACRES ±

WAVEYARD  
120.6 ACRES ±

WEST HALF  
SECTION OF  
SECTION 18,  
T.1N.,R.5E

POINT OF  
BEGINNING

8TH STREET

DOBSON ROAD



**EXHIBIT A-1**  
**DEPICTION OF THE PROPERTY**



WAVEYARD

EXHIBIT A-1

SCALING 1:200

**EXHIBIT B**  
**DEVELOPMENT MASTER PLAN**

# DEVELOPMENT MASTER PLAN

- 1 INDOOR ATTRACTIONS (2.6 ac)
  - 2 OUTDOOR ATTRACTIONS (440.0 ac)
  - 3 ADVENTURE RESORT (10.5 ac)
  - 4 MIXED USE/RETAIL/RES (79.5 ac)
  - 5 GENERAL PARKING (980 ac)
  - 6 RESORT VILLAS (47.2 ac)
  - 7 MIXED USE/OFFICE/RES (19.8 ac)
  - 8 RECONFIGURED MESA CITY PARK (25.0 ac)
- (Acreage to be refined with future planning)



WAYFAR

GREY PUCKETT  
ARCHITECTS  
MAY 2007  
SCALE: 1/2"=1'-0"

## **EXHIBIT C**

### **MINIMUM PUBLIC IMPROVEMENTS**

#### **Improvements at Dobson and Riverview Auto Drive:**

- Add dual right turn lanes for southbound to westbound.
- Add a second eastbound to northbound left turn lane and modify traffic signal to provide fully-protected east/west left turns.

#### **Improvements at Dobson and 8<sup>th</sup> Street:**

- Add a second eastbound to northbound left turn lane and modify traffic signal to provide fully-protected east/west left turns.

#### **Improvements at 8<sup>th</sup> Street and Evergreen/Center Waveyard Entrance:**

- Install a traffic signal with east/west protected/permitted left turn signals per City of Mesa standards.
- Add a westbound decel lane into Waveyard.

#### **Improvements at 8<sup>th</sup> Street and East Waveyard Entrance:**

- Install a traffic signal with dual eastbound to northbound left turn lanes.
- Add a westbound decel lane.

**EXHIBIT D**  
**LAND CONTRACT**

**AGREEMENT TO PURCHASE REAL PROPERTY  
AND ESCROW INSTRUCTIONS  
(Waveyard Transaction)**

=====

**DATE:** June \_\_, 2007

**SELLER:** *City of Mesa, an Arizona municipal corporation*  
Address: 20 East Main Street, Suite 850  
Post Office Box 1466  
Mesa, Arizona 85211  
Attn: Douglas Tessendorf,  
Real Estate Services Director  
Telephone: 480-644-2520  
Facsimile: 480-644-3465  
Email: douglas.tessendorf@cityofmesa.org

**BUYER:** *Waveyard Development, LLC, a Delaware limited liability company*  
Address: 8912 East Pinnacle Peak Road, No. F9-664  
Scottsdale, Arizona 85255  
Attn: Jerry Hug or Richard Mladick  
Telephone: 480-563-8881  
Facsimile: 480-342-8886  
Email: mladick@waveyard.com  
jhug@waveyard.com

**ESCROW AGENT:** *Security Title Agency*  
Address: 2152 South Vineyard Avenue, Bldg. 6, Ste. 116  
Mesa, Arizona  
Telephone: 480-345-6345  
Facsimile: 480-345-6409  
Escrow Officer: Vicki Bartlett  
Email: vbartlett@securitytitle.com  
Escrow Number:

**PROPERTY:** The real property located in Maricopa County, Arizona, legally described on Exhibit A, including all improvements, subject to Section 2.5 of this Agreement, located on and all rights and privileges appurtenant to the real property (the "Property").

**ARTICLE 1**  
**AGREEMENT OF THE PARTIES**

1.1 Agreement. In consideration of the mutual promises and covenants set forth in this Agreement, Seller agrees to sell to Buyer and Buyer agrees to buy the Property on the terms and conditions set forth in this Agreement.

**ARTICLE 2**  
**SALES PRICE AND PAYMENT TERMS**

2.1 Sales Price. The total sales price which Buyer agrees to pay for the Property is Thirty Million Dollars (\$30,000,000.00), (the "Sales Price"). The Sales Price shall be payable as follows:

(a) Earnest Money. Fifty Thousand and No/100 Dollars (\$50,000.00) as the earnest money (the "Earnest Money") which Buyer agrees to deposit in Escrow on the Opening Date;

(b) At the Closing, Buyer shall deposit with Escrow Agent the amount of Nine Million, Nine Hundred and Fifty Thousand and No/100ths Dollars (\$9,950,000.00) in cash or by wire transfer of immediately available funds (the "Closing Payment"). The balance of the Purchase Price shall be paid to Seller by Buyer at the Close of Escrow by delivery to Seller of a Promissory Note in the amount of twenty million dollars (\$20,000,000) and in the form attached hereto and incorporated herein as Exhibit B (the "Note"), which Note shall be secured by a first position Deed of Trust in the form attached hereto and incorporated herein as Exhibit C (the "Deed of Trust").

2.2 Earnest Money Provisions. All Earnest Money required by this Agreement shall be deposited by wire transfer or other form of immediately available funds to the account of Escrow Agent in the amount of the required Earnest Money. Escrow Agent is hereby instructed to deposit all Earnest Money in a federally-insured money market or similar account, subject to immediate withdrawal, at a bank or savings and loan institution located in Maricopa County, Arizona (an "Approved Investment Account"). Upon Closing, the Earnest Money and interest earned thereon shall be credited to the Sales Price.

2.3 Disbursements. Escrow Agent shall disburse the Earnest Money and interest earned thereon, and the Closing Payment, to Seller on the Closing Date less any funds required to take into account the prorations and other adjustments required of Seller by this Agreement. If the Earnest Money and applicable interest and the Closing Payment are not disbursed to Seller on the Closing Date, such amounts shall be invested by Escrow Agent in an Approved Investment Account until the next business day following the Closing Date when they shall be disbursed to Seller together with all interest earned thereon following the Closing Date. Escrow Agent shall not charge any fee for such investment of the Earnest Money and earned interest. If the Earnest Money is forfeited to Seller as provided in this Agreement, such amounts, with any interest earned thereon, shall be paid immediately to Seller. If Buyer is entitled at any time to a refund of Earnest Money deposits held in Escrow, any interest earned thereon shall be paid to Buyer.

2.4 Non-Refundable Nature of Earnest Money. If Buyer cancels or terminates this Agreement, as permitted under the terms of this Agreement, prior to the end of the Feasibility Period, the Earnest Money shall be returned to Buyer. After the Feasibility Period, the Earnest Money shall be absolutely non-refundable to Buyer, except as otherwise expressly provided in Sections 5.1(a)(v), 5.3, 9.1(b) and 11.2, in consideration for Seller giving and granting Buyer the right to purchase the Property as described in this Agreement and taking the Property off the market and not as a penalty.

2.5 Park and Golf Course Property. Buyer agrees and acknowledges that the purchase of the Property does not include any personal or similar property presently located on the Property that Seller elects to remove from the Property, such as lights, benches, back stops, park, playground, golf course or other recreational equipment, and any other improvements on the Property (the "Park and Golf Course Property"), which Seller shall have the right to remove for the longer of the following periods of time (the "Removal Period"): (i) sixty (60) days after Closing, or (ii) until Buyer undertakes Commencement of Construction as defined in the Development Agreement described in Section 5.1(d) below. Park and Golf Course Property that City does not elect to remove within the Removal Period shall become Buyer's property. City shall have no obligation to remove any Park and Golf Course Property. The terms and conditions of this Section shall survive the Closing and will not merge with the provisions of the closing documents. Additionally, Seller shall have the right to continue to use and operate the softball fields and golf course during the Removal Period; provided, however, that such use and operation of the softball fields and golf course shall not extend the Removal Period. The terms and provisions of this Section 2.5 shall survive the Closing.

### **ARTICLE 3 ESCROW**

3.1 Establishment of the Escrow. An escrow for this transaction (the "Escrow") is established with Escrow Agent, and Escrow Agent is engaged to administer the Escrow.

3.2 Opening Date. Within three (3) business days after the execution of this Agreement by both Buyer and Seller, Seller will deliver a fully executed copy of this Agreement to Escrow Agent and Buyer will deliver the Earnest Money as specified in Section 2.1(a). The date that this Agreement, together with the Earnest Money deposit is delivered to Escrow Agent, is referred to in this Agreement as the "Opening Date." Escrow Agent shall notify Buyer and Seller in writing of the Opening Date.

3.3 Acceptance of Escrow. By accepting the Escrow, Escrow Agent agrees to the terms of this Agreement as they relate to the duties of Escrow Agent.

3.4 Escrow Instructions. This Agreement constitutes escrow instructions to Escrow Agent. If Escrow Agent requires the execution of its standard form printed escrow instructions, Buyer and Seller agree to execute those instructions; however, those instructions will be construed as applying only to Escrow Agent's engagement. If there are conflicts between the

terms of this Agreement and the terms of the printed escrow instructions, the terms of this Agreement will control.

3.5 Escrow Cancellation Charges. If the Escrow fails to close because of Seller's default, Seller will pay all customary Escrow cancellation charges. If the Escrow fails to close because of Buyer's default or cancellation of this Agreement for any reason other than the default of Seller, Buyer will pay all customary Escrow cancellation charges. If the Escrow fails to close for any other reason, Seller and Buyer will each pay one-half of all customary Escrow cancellation charges.

3.6 Insured Closing Letter. If Escrow Agent does not issue its own title insurance policies, but acts as an agent for the Title Insurer (as defined in Section 6.3), Escrow Agent will cause the Title Insurer to issue to the parties, a closing protection letter or insured closing service in written form satisfactory to Buyer and Seller, within five (5) calendar days following the Opening Date.

#### **ARTICLE 4**

#### **INFORMATION TO BE PROVIDED**

##### **4.1 Information and Other Items to Be Provided.**

(a) Diligence Materials. During the Feasibility Period (as defined in Section 5.1(b)), Seller shall allow Buyer access, upon reasonable notice and during business hours, for review and copying of Seller's Real Estate Department's public records that relate to the Property ("Seller's Materials"). Buyer shall be responsible, at Buyer's sole expense, to undertake any additional investigation desired by Buyer concerning the condition of the Property pursuant to the terms of the Access Agreement described in Section 5.1(b). Seller expressly does not warrant the truthfulness or accuracy of any fact, finding, conclusion, or opinion included in any of the Seller's Materials.

(b) Preliminary Title Report. Escrow Agent shall provide Buyer and Seller as soon as possible following the Opening Date, but in no event later than forty-five (45) days following the Opening Date, with (i) a commitment for an ALTA extended owner's title insurance policy (Form 2006) covering the Property to be issued by the Title Insurer to Buyer (the "Report"), which Report shall show the status of title to the Property as of the date of the Report and contain the express commitment of the Title Insurer to issue the Title Policy (described in Section 6.3), and (ii) legible copies of all documents referred to in the Report.

(c) Survey. Buyer shall have a current ALTA Survey of the Property (the "Survey") prepared by a registered land surveyor, licensed in the State of Arizona, satisfactory to Seller and Buyer, prior to expiration of the Feasibility Period. The Survey will show all easements, encroachments, and other matters affecting the Property, and indicate the acreage of the Property. The Survey shall be certified to be accurate, complete and correct to Buyer, Seller, and Title Insurer. Buyer shall provide Seller with three (3) copies of the Survey and Escrow Agent with one (1) copy of the Survey.

(d) Public Easements. Seller shall retain rights, in the form of easements on, over, under and across the Property to provide for repair and maintenance of, continued use of, and access to, the existing ditches, pipes, conduits, utility lines and other facilities and infrastructures located either on the Property, or on adjacent property owned by Seller. The nature of the easements, the form of easement grant and the exact descriptions of all easement premises (collectively, the "Easements") shall be agreed to by Buyer and Seller prior to the expiration of the Feasibility Period. Seller, at its sole election, may either reserve the Easements, or require Buyer to grant the Easements to Seller (and/or any other named parties in the approved easement grants) at Closing, either by instrument or by map of dedication. Any reserved Easement shall be deemed an Approved Title Exception; and any Easement granted by Buyer to Seller at Closing shall be recorded immediately after the Deed, and prior to any lien, claim or encumbrance against the Property by or in favor of Buyer. Buyer acknowledges that, due to the adjacent City Wastewater Treatment Facility (the "Treatment Facility"), the Easements will include terms and conditions such as to allow installation, repair and maintenance, to all utilities and improvements related to the Treatment Facility. If the location, area, terms and conditions of the Easements are not resolved and mutually approved by Seller and Buyer (in Seller's and Buyer's sole and absolute discretion) within the Feasibility Period, either party may terminate this Agreement by delivery of written notice to the other party, and the parties shall have no further obligations to each other pursuant to this Agreement except to the extent this Agreement expressly states that an obligation herein shall survive such termination.

(e) Property. While the Property is legally described in Exhibit A, Seller and Buyer agree that this legal description must be modified or corrected in order to exclude from the current Exhibit A certain real property that will be retained by Seller as a public park, and to describe the Property as containing not more than 121 acres. Within the Feasibility Period, Seller (acting through its City Manager) shall determine the correct legal description for the Property (the "Corrected Legal Description"), and deliver a copy of the Corrected Legal Description to Buyer and to Escrow Agent, which Corrected Legal Description shall thereupon be substituted for the current Exhibit A. If Buyer does not approve the Corrected Legal Description, then within ten (10) business days after having been provided with the Corrected Legal Description by Seller, Buyer (in Buyer's sole and absolute discretion) may terminate this Agreement by delivery of written notice of such termination, and the parties shall have no further obligations to each other pursuant to this Agreement except to the extent this Agreement expressly states that an obligation herein shall survive such termination. Buyer acknowledges and agrees that the Property does not include the City's well site, or any improvements at the well site, generally located at the northeastern boundary of the Property. Buyer further acknowledges that the retained City property and park shall include a "linear" park that runs along the north side of Eighth Street. The Sales Price shall not be reduced or increased for any legal description that results in a reduction or increase in size of the Property.

(f) Lease. Within the Feasibility Period, Seller (as Lessor) and Buyer (as Tenant) shall mutually agree to the terms of a lease (the "Lease") of approximately 5 acres of property (the "Lease Property") that is located adjacent to the Property and the Treatment Facility. Buyer acknowledges that, due to the adjacent Treatment Facility, the Lease will include terms and conditions for the installation, repair and maintenance of all underground and overhead

utilities (water, gas, sewer, electric, phone, cable, etc.) necessary for the operation and expansion of the Treatment Facility, and allow Seller to terminate the Lease if Seller expands its Treatment Facility. If the Lease Area and the terms and conditions of the Lease are not resolved and mutually approved by Seller and Buyer (in Seller's and Buyer's sole and absolute discretion) within the Feasibility Period, either party may terminate this Agreement by delivery of written notice to the other party, and the parties shall have no further obligations to each other pursuant to this Agreement except to the extent this Agreement expressly states that an obligation herein shall survive such termination.

(g) Wall Agreement. Within the Feasibility Period, Seller and Buyer shall mutually agree to the terms of an agreement (the "Wall Agreement") for a perimeter wall or fence around the portions of the Treatment Facility that will be adjacent to the Property and Lease Property. If the terms of the Wall Agreement are not resolved and mutually approved by Seller and Buyer (in Seller's and Buyer's sole and absolute discretion) within the Feasibility Period, either party may terminate this Agreement by delivery of written notice to the other party, and the parties shall have no further obligations to each other pursuant to this Agreement except to the extent this Agreement expressly states that an obligation herein shall survive such termination.

(h) Well Agreement. Within the Feasibility Period, Seller and Buyer shall mutually agree to the terms of an agreement (the "Well Agreement") regarding the permitting, equipment installation, security, operation and maintenance of City of Mesa Well #27 (Arizona Department of Water Resources Well Number 55-583894). If the terms of the Well Agreement are not resolved and mutually approved by Seller and Buyer (in Seller's and Buyer's sole and absolute discretion) within the Feasibility Period, either party may terminate this Agreement by delivery of written notice to the other party, and the parties shall have no further obligations to each other pursuant to this Agreement except to the extent this Agreement expressly states that an obligation herein shall survive such termination.

(i) Park Agreement. Within the Feasibility Period, Seller and Buyer shall mutually agree to the terms of an agreement (the "Park Agreement") for the payment for costs and expenses related to the modifications to Riverview Park and Golf Course (the "Park") and/or the obligation to construct or provide improvements to the Park and/or provide or pay for Park maintenance. If the terms of the Park Agreement are not resolved and mutually approved by Seller and Buyer (in Seller's and Buyer's sole and absolute discretion) within the Feasibility Period, either party may terminate this Agreement by delivery of written notice to the other party, and the parties shall have no further obligations to each other pursuant to this Agreement except to the extent this Agreement expressly states that an obligation herein shall survive such termination.

## **ARTICLE 5**

### **CONDITIONS TO CLOSING**

5.1 Conditions to Buyer's Obligation to Close. Buyer's obligations to close this transaction are subject to the satisfaction (or waiver by Buyer in writing), of the following conditions on and as of the expiration of the Feasibility Period unless an earlier date is specified:

(a) Title Review. Buyer shall be satisfied with the status of title to the Property as disclosed by the Report and the Survey. In that regard:

(i) Buyer shall have the earlier of ninety (90) days following the Opening Date or thirty (30) days following its receipt of the Survey and Report (the "Title Review Period") to approve or disapprove the status of title as shown by the Survey or the Report. If Buyer is dissatisfied with any exception to title as shown in the Report or the Survey that reflects a material flaw in Seller's title to the Property, then Buyer may, by giving notice to Seller and Escrow Agent within the Title Review Period, either:

(1) Cancel this Agreement; or

(2) Provisionally accept title subject to Seller's cure of the material flaw in Seller's title described in Buyer's notice either by removal of any disapproved matters, exceptions or objections; or Seller obtaining title insurance endorsements satisfactory to Buyer against such matters, exceptions and objections within ninety (90) days following receipt of Buyer's notice ("Seller's Title Cure Period"). If Seller does not remove such matters, exceptions and objections before the expiration of the Seller's Title Cure Period, then, Buyer's sole and exclusive remedies shall be either to waive such disapproved matters or to cancel this Agreement by giving written notice to Seller and Escrow Agent on or before the tenth (10th) calendar day following expiration of the Seller's Title Cure Period. Seller shall have no affirmative obligation whatsoever to eliminate or obtain title insurance endorsements over any matters shown by the Report or Survey to which Buyer has made an objection.

(ii) If, prior to Closing, Escrow Agent issues a supplemental title report showing additional exceptions to title (a "Title Supplement"), Buyer shall have a period of time equal to ten (10) days from the date of receipt of the Title Supplement and a copy of each document referred to in the Title Supplement (a "Supplemental Title Review Period") in which to give notice of dissatisfaction as to any material title defect reflected by any additional exceptions shown in the Title Supplement. If Buyer is dissatisfied with any additional exception in the Title Supplement that reflects a material flaw in Seller's title to the Property, then Buyer may, by giving notice to Seller and Escrow Agent within the Supplemental Title Review Period, either:

(1) Cancel this Agreement; or

(2) Provisionally accept title subject to Seller's cure of the material flaw in Seller's title described in Buyer's notice by removal of any disapproved matters, exceptions and objections, or Seller obtaining title insurance endorsements satisfactory to Buyer against such matters, exceptions and objections within thirty (30) days following issuance of the applicable Title Supplement (the "30-Day Period"). If Seller does not remove such matters, exceptions and objections before the expiration of the 30-Day Period, then, Buyer's sole and exclusive remedy shall be either to waive such disapproved matters or to cancel this Agreement by giving written notice to Seller and Escrow Agent on or before the 10 (10th) calendar day following expiration of the 30-Day Period. Seller shall have no affirmative obligation to

eliminate or obtain title insurance endorsements over any matters shown by the Title Supplement to which Buyer has made an objection.

(iii) If Buyer does not object to an exception to title as disclosed by the Report or Title Supplement within the Title Review Period or Supplemental Title Review Period, as applicable, the matter will be deemed to have been approved by Buyer. The matters shown in the Report and any Title Supplement (other than standard printed exceptions and exclusions that will be included in the Title Policy) that are approved or deemed approved by Buyer in accordance with this Section 5.1(a), and any other matters approved by Buyer in writing, are referred to in this Agreement as the "Approved Title Exceptions."

(v) Upon a cancellation in accordance with the provisions of Section 5.1(a)(i), all Earnest Money shall be returned to Buyer, together with all documents deposited in Escrow by Buyer, if the cancellation occurs within ten (10) calendar days following expiration of the Title Review Period, in the event of cancellation under Section 5.1(a)(i)(1) or the Seller's Title Cure Period, in the event of cancellation under Section 5.1(a)(i)(2). If the cancellation occurs following the Feasibility Period and following such ten (10) day period after expiration of the Title Review Period or the Title Cure Period, as applicable, all Earnest Money required to be paid prior to such date shall be paid to and retained by Seller unless the cancellation arises out of a new title exception voluntarily placed on the Property by Seller without Buyer's consent or deemed consent pursuant to Section 5.1(a)(iii), in which case the Earnest Money shall be returned to Buyer upon such cancellation. Following any cancellation pursuant to this provision, all documents deposited in Escrow by Seller shall be returned to Seller and this Agreement shall terminate.

(b) Buyer's Investigations. Buyer shall have until 5:00 P.M. (M.S.T.) on the two hundred and seventieth (270th) day following the Opening Date (the "Feasibility Period") to conduct an investigation and inspection of the Property (subject to the obligation, which Buyer confirms, to restore any damage caused by its activities and to indemnify Seller as provided in the Access Agreement). Buyer's investigation may include, among other things: (1) the physical condition of the Property; (2) the environmental condition of the Property; and (3) the feasibility of Buyer's anticipated development of the Property and matters related thereto. Buyer shall execute the Access Agreement attached hereto as Exhibit D (the "Access Agreement") on the Opening Date, which shall govern the terms and conditions of Buyer's rights to access the Property prior to the Closing or earlier termination of this Agreement. If Buyer is not satisfied with its investigations and inspections with respect to the Property and this transaction, or if the further agreements (the Easements, the Mutually Approved Legal Description, the Lease, the Wall Agreement, the Well Agreement and the Park Agreement) are disapproved by Buyer in its sole discretion, or if the status of or City's resolution of the City Consequences is disapproved by Buyer in its sole discretion, then Buyer will have the right, exercisable in its sole discretion, to cancel this Agreement by delivering written notice of cancellation to Seller and Escrow Agent prior to the end of the Feasibility Period, in which case all Earnest Money deposited with Escrow Agent prior to cancellation shall be returned to Buyer.

(c) Pre-Development Activities. Buyer shall have the right, at Buyer's cost

during the term of this Agreement, to engage in the following activities with respect to the Property: hire a marketing team with a qualified brokerage firm; design and produce a building rendering, site plan and floor plans; prepare marketing brochures and support materials for the Project; meet with prospective users, prepare lease offers, and obtain pre-leasing commitments; obtain pre-construction bids as needed to secure reliable cost estimates; process site development and/or architectural review approvals for the Property; and solicit project construction financing offers. All of the foregoing shall be conditioned on Buyer's acquisition of the Property and none of the foregoing shall result in a lien or encumbrance on the Property that is not removed upon the termination of this Agreement.

(d) Development Agreement and Election. Buyer and Seller intend to enter, or have entered, into a development agreement (the "Development Agreement") for the Property. The Development Agreement provides, subject to conditions and restrictions, for certain tax rebates and expenditures that are subject to provisions of Section 613 of the Mesa City Charter. If the Section 613 Incentives (as defined in the Development Agreement) in the Development Agreement are not approved by a majority of the electorate voting at the Election (as defined in the Development Agreement), on November 6, 2007, then this Agreement shall automatically terminate and shall be of no further force or effect, and Buyer and Seller shall have no further obligations or liabilities hereunder, except for any obligations or liabilities which survive the termination of this Agreement.

(e) Zoning. Buyer and Seller acknowledge and agree that this Agreement is contingent upon the Zoning (as defined in the Development Agreement) being adopted and approved by the City Council, with stipulations acceptable to Buyer.

5.2 Conditions to Seller's Obligation to Close. Seller shall have no obligation to sell the Property to Buyer unless each of the following matters has been satisfied; provided, however, that Seller in its sole and unfettered discretion may elect to waive any such matter.

(a) Full Compliance. Seller's obligation to close this transaction is subject to Buyer fully performing all of its obligations to be performed by Buyer on or before the Closing Date (unless waived by Seller in writing). If Buyer has not fulfilled all such obligations on or before the Closing Date, Seller may pursue its remedies for Buyer's default if Buyer has not performed all such obligations within ten (10) days after receipt of written notice from Seller, describing same and the action required for performance, as required by Section 11.3.

(b) Seller's Council Approval. The City of Mesa Council's approval of the sale of the Property prior to Closing.

(c) Lease. At Closing, Buyer (as Tenant) shall have executed and delivered to Escrow Agent, for delivery to Seller, the Lease with the terms and legal description approved by Seller.

(d) Wall Agreement. On or before the Close of Escrow, Buyer shall have executed and delivered to Escrow Agent, for delivery to Seller, the Wall Agreement with the terms approved by Seller.

(e) Well Agreement. On or before the Close of Escrow, Buyer shall have executed and delivered to Escrow Agent, for delivery to Seller, the Well Agreement with the terms approved by Seller.

(f) Park Agreement. On or before the Close of Escrow, Buyer shall have executed and delivered to Escrow Agent, for delivery to Seller, the Park Agreement with the terms approved by Seller.

(g) Easements. On or before the Close of Escrow, Buyer shall have executed and delivered to Escrow Agent, for recordation by Escrow Agent, the Easements in the form(s) and with the terms approved by Seller.

(h) Release of Federal Reverter. On or before the Close of Escrow, the United States of America, acting by and through the Secretary of Interior and the Director of the National Park Services (the "Park Services") shall have provided Seller a release or discharge of the deed restrictions and reversionary rights in favor of the federal government, with respect to a portion of the Property that the City obtained from the Park Services, with such release or discharge to be subject to terms and conditions satisfactory to Seller in its sole and absolute discretion.

(i) Relocation of Park Boundary Designation. On or before Close of Escrow, Seller obtaining approval of a conversion through an amendment to the participant agreement from the National Park Service and Arizona State Parks to transfer the Land and Water Conservation Fund 6(f) park boundary protection designation from the northern half of the Riverview Park to a site approved by the National Park Service and Arizona State Parks.

(j) Financial Ability to Perform. On or before the Close of Escrow, Buyer shall have provided clear and sufficient evidence to establish to the City Manager, as determined in his sole and absolute discretion, the financial ability of Buyer to perform the obligations in the Development Agreement, including the financial ability to construct all the Minimum Improvements (as defined in the Development Agreement).

(k) City Consequences. The City is determining the applicability or extent of possible restrictions, limitations or consequences that may be imposed upon the City or the Property (which restrictions, limitations or consequences are referred to in this Agreement and the "City Consequences") that may take the form, *inter alia*, of reimbursements or reallocations of monies to federal or other agencies, expense required or incurred in connection with identifying, evaluating and mitigating archeological sites or artifacts located in or around the Property, delays incurred in seeking federal and other third-party approvals of requested or required actions or submittals, and restrictions on the transferability of portions of the Property. At any time prior to the Close of Escrow that the City determines, in its sole and absolute discretion, that the City Consequences are not acceptable to the City, then the City, upon written

notice to Buyer and Escrow Agent may cancel this Agreement and the Escrow. Notwithstanding the foregoing, the City agrees to use good faith efforts to reduce the effects of any City Consequences and to confirm to Buyer at the earliest opportunity that the City Consequences are satisfactory to the City. Upon written request from Buyer, Seller shall advise Buyer of the City's efforts with regard to determining and evaluating the City Consequences.

(l) Approved Site Plan. Not less than thirty (30) days before the Close of Escrow, Buyer shall have obtained an approved site plan (the "Approved Site Plan") from the Mesa City Council, which includes all the Minimum Improvements (as defined in the Development Agreement).

(m) DRB Approval. Not less than thirty (30) days before the Close of Escrow, Buyer shall have obtained approval from the City's Design Review Board, or City Council as permitted under the City's Zoning Ordinance (the "DRB Approval"), for the design and construction of all the Minimum Entertainment Improvements (as defined in the Development Agreement) and all the Minimum Resort Improvements (as defined in the Development Agreement).

(n) Issued Permits. At or before the Close of Escrow, Buyer shall have obtained permits (the "Issued Permits") from the City of Mesa's Building Safety Division for all the Minimum Entertainment Improvements (as defined in the Development Agreement) and all the Minimum Resort Improvements (as defined in the Development Agreement), including the actual payment of all fees for such permits and the actual issuance of such permits.

(o) Public Vote. If the Section 613 Incentives in the Development Agreement are not approved by a majority of the electorate voting at the Election, on November 6, 2007, this Agreement shall automatically terminate and shall be of no further force or effect, and Buyer and Seller shall have no further obligations or liabilities hereunder, except for any obligations or liabilities which survive the termination of this Agreement.

5.3 Return of Earnest Money. If Closing does not occur solely due to Sections 5.2(h), (i), (j), (k) or (o), the Earnest Money shall be returned to Buyer.

## **ARTICLE 6**

### **CLOSING DOCUMENTS; TITLE POLICIES**

6.1 Seller's Closing Documents. On or before the Closing Date, Seller will deposit the following documents into the Escrow for delivery to Buyer at the Closing each of which will have been duly executed and, where appropriate, acknowledged:

(a) Deed. A Special Warranty Deed in the form attached hereto as Exhibit E (the "Deed") for conveyance of the real property, including the property restrictions set forth in the Deed.

(b) Title Insurance Affidavit. An affidavit from Seller to the Escrow Agent and Title Insurer regarding parties in possession and mechanic's and materialmen's liens, in customary form, stating information accurate at the time of Closing to Seller's actual knowledge and belief, for Title Insurer to delete exceptions in the title insurance policy for parties in possession (other than the tenant under the Tenant Lease, if applicable) and mechanic's and materialmen's liens.

(c) Easements. Forms of easement grants for the Easements, in form previously agreed by the Parties.

(d) FIRPTA Affidavit.

(e) Lease.

(f) Note.

(g) Deed of Trust.

(h) Additional Documents. Such other documents as may be necessary or appropriate to transfer and convey the Property to Buyer and to otherwise consummate this transaction in accordance with the terms of this Agreement.

6.2 Buyer's Closing Documents. On or before the Closing and in addition to all funds required to be paid by Buyer, Buyer will deposit into the Escrow the following documents for delivery to Seller at the Closing, each of which will have been duly executed and, where appropriate, acknowledged:

(a) Deed.

(b) Easements. Forms of easement grants for the Easements, in form previously agreed by the Parties.

(c) Affidavit of Real Property Value.

(d) Lease.

(e) Additional Documents. Such other documents as may be necessary or appropriate to acquire the Property and to otherwise consummate this transaction in accordance with the terms of this Agreement.

6.3 Title Policy. At the Closing, Seller will provide Buyer with an ALTA extended coverage owner's policy of title insurance (the "Title Policy") issued by Fidelity National Title Insurance Company (the "Title Insurer"), in the amount of the Sales Price, effective as of the Closing, insuring Buyer that fee simple title to the Property is vested in Buyer, subject only to the usual printed exceptions and exclusions contained in such title insurance policies and the

Approved Title Exceptions. The Title Policy shall contain endorsements, if any, that Seller has agreed to obtain to cure title objections of Buyer made pursuant to Section 5.1(a) and shall also contain any endorsements requested by Buyer which Title Insurer has agreed to issue. Seller shall have no obligation to provide endorsements to the Title Policy which are not approved for issuance by Title Insurer. Seller will satisfy Escrow Agent's standard requirements for issuance of such policy, other than those, if any, within Buyer's control. Buyer must satisfy all of Escrow Agent's requirements for issuance of any title insurance endorsements requested by Buyer.

## **ARTICLE 7 CLOSING THE TRANSACTION**

7.1 Closing. The closing of this transaction (the "Closing" or "Close of Escrow") shall occur promptly after the completion of all of the following events (i) Buyer has obtained an Approved Site Plan (as defined in Section 5.2(l)), (ii) Buyer has obtained the DRB Approval (as defined in Section 5.2(m)), (iii) Buyer has obtained the Issued Permits (as defined in Section 5.2(n)), (iv) Buyer, in writing, informs Escrow Agent and Seller no fewer than thirty (30) days before the scheduled Closing that it intends to close on a date set forth in such notice; and (v) Buyer, in writing, informs Escrow Agent and Seller no fewer than five (5) business days before the scheduled Closing that requirements described in (i), (ii), and (iii) have been satisfied (the "Closing Date"); provided, however, if the above requirements (i) through (v) have not been completed by January 11, 2010, then this Agreement shall automatically terminate and shall be of no further force or effect, and Buyer and Seller shall have no further obligations or liabilities hereunder, except for any obligations or liabilities which survive the termination of this Agreement. If the date of the Closing would otherwise occur prior to expiration of a Supplemental Review Period, at Buyer's request, the Closing Date shall be extended to the day following expiration of the Supplemental Review Period. The Closing shall occur in the offices of Escrow Agent.

### 7.2 Closing Costs and Prorations.

- (a) Escrow Fees. Seller and Buyer will each pay one-half of the Escrow fees.
- (b) Title Insurance Fees. Seller will pay the entire premium for a standard coverage owner's policy of title insurance in the amount of the Sales Price and the premium for any endorsements required to cure any title objections of Buyer which Seller has agreed to cure through the issuance of endorsements. Buyer will pay the additional premium necessary to obtain the Title Policy described in Section 6.3 and the cost of any additional endorsements to such Title Policy requested by Buyer.
- (c) Recording Fees. Buyer will pay the cost of recording the Deed. Seller will pay the cost of removing liens, encumbrances or other title matters if Seller elects to undertake such matters under Section 5.1(a)(i)(2). Recording fees for any new loan(s) obtained by Buyer shall be paid by Buyer.
- (d) Taxes and Assessments. Real estate taxes, irrigation district assessments,

and improvement assessment fees, if any, will be prorated in the escrow as of the Closing based upon the most current information then available to Escrow Agent.

(e) Miscellaneous Closing Costs. Any other closing costs not provided for above will be paid by Buyer and Seller as they shall mutually agree.

7.3 Payments and Disbursements to be Handled through the Escrow. The various charges, credits and prorations contemplated by this Agreement will be handled by Escrow Agent through the Escrow by appropriate charges and credits to Buyer and Seller, and each party shall pay its allocable closing costs and charges in cash, it being the intent of the parties that Seller receive a "net" payment of \$10,000,000.00 payment from Buyer at Closing and pay its escrow, title and other fees and charges separately. All amounts payable pursuant to this Agreement will be paid to Escrow Agent for disposition through the Escrow. Escrow Agent is authorized to make all disbursements to the parties and to third parties contemplated by this Agreement from funds deposited for those purposes, as necessary or appropriate to close this transaction.

7.4 Final Disbursement to Seller. Upon the Closing or prior to such date as expressly required by this Agreement, all amounts paid according to Sections 2.1 will be disbursed to Seller.

7.5 Buyer's Obligation to Deposit Additional Funds. On or before the Closing, Buyer will deposit with Escrow Agent cash in an amount sufficient to pay all closing costs and other amounts payable by or otherwise chargeable to Buyer.

7.6 IRS Reporting at Closing. Escrow Agent agrees to be the designated "reporting person" under Section 6045(e) of the U.S. Internal Revenue Code with respect to the real estate transaction described in this Agreement and to prepare, file and deliver such information, returns and statements as the U.S. Treasury Department may require by regulations or forms in connection therewith, including Form 1099-B.

7.7 Recording and Filing of Documents. At the Closing, the Deed, the Deed of Trust, grant or map of dedication for Easements shall be recorded by Escrow Agent in the Maricopa County Recorder's Office.

## **ARTICLE 8 ADDITIONAL COVENANTS**

8.1 Possession. Sole and exclusive possession of the Property will be delivered to Buyer upon the Closing, subject only to the Approved Title Exceptions, the lien created by the Deed of Trust, and the restrictions set forth in the Deed; provided, however, that Seller shall have the right to continue to use the Property for municipal park, golf course, and recreational purposes, at no cost to Seller, following the Closing up through the Removal Period (as defined in Section 2.5).

8.2 Risk of Loss. Except as provided in the Access Agreement, the risk of loss or damage to the Property and all liability to third persons until the Closing will be borne by Seller.

8.3 Right to Enter and Inspect the Property. Subject to the Access Agreement, from time to time prior to the Closing, Buyer may enter the Property with Buyer's representatives, contractors, and agents to examine the Property, conduct soil tests, environmental studies, engineering feasibility studies, and other tests and studies, and to plan the proposed development of the Property pursuant to the terms of the Access Agreement.

8.4 Brokerage. If any person asserts a claim to a finder's fee, brokerage commission or other compensation on account of alleged employment as a finder or broker or performance of services as a finder or broker in connection with this transaction, the party under whom the finder or broker is claiming shall be fully responsible for all claims related thereto and, to the extent authorized by law, shall indemnify, pay, defend and hold the other party harmless for, from, and against any claims related thereto. This indemnity will survive the Closing or the cancellation of this Agreement.

## **ARTICLE 9 REPRESENTATIONS AND WARRANTIES**

### **9.1 Representations and Warranties of Seller.**

(a) Seller represents that:

(i) As of the date hereof, to the best of Seller's actual knowledge, there are no pending, threatened or contemplated actions, suits, proceedings or investigations, at law or in equity, or otherwise in, for or by any court or governmental board, commission; agency, department or office arising from or relating to this transaction, the Property or the operations of Seller on the Property.

(ii) As of the date hereof, Seller has not received notice from any governmental or other agency, and to the best of Seller's actual knowledge, there are no proceedings with respect to or in connection with the condemnation of the Property.

(iii) Seller has not granted any options or rights of first refusal to purchase all or any part of the Property.

(iv) Subject to Seller's City Council's approval of this transaction and the express terms and limitations in this Agreement, and further subject to the Public Vote described in Section 5.2(o), the person or persons executing this Agreement on behalf of Seller are duly authorized to do so and thereby bind Seller hereto without the signature of any other party.

(v) Subject to Seller's City Council's approval of this transaction, and further subject to the Public Vote described in Section 5.2(o), Seller has all requisite power and authority to enter into and perform this Agreement and to incur the obligations provided for

herein and has taken all action necessary to authorize the execution, delivery and performance of this Agreement subject to the express terms and limitations in this Agreement.

(vi) Seller has not filed for protection or relief under any applicable bankruptcy or creditor protection statute nor has Seller been threatened by creditors with an involuntary application of any applicable bankruptcy or creditor protection statute. Seller is not entering into this Agreement with an intent to defraud any creditor or to prefer the rights of one creditor over any other.

(vii) Subject to the Public Vote described in Section 5.2(o), Agreement is valid, binding and enforceable in accordance with its terms.

(viii) Seller has received no written notice and has no actual knowledge, of any noncompliance with any Federal, state or local laws, regulations and orders relating to environmental matters with respect to the Property. Seller has received no written notice and has no actual knowledge, that Seller is a potentially responsible party for a Federal, state or local clean-up site or corrective action with respect to the Property under any environmental law, regulation or order.

(b) Inaccuracy of Representation. If a matter represented by Seller under this Agreement was true as of the date of this Agreement, but subsequently is rendered inaccurate because of the occurrence of events or because of a cause other than Seller's intentional breach of this Agreement, then such inaccuracy shall not constitute a default by Seller under this Agreement, but will constitute a failure of a condition to Closing only if such inaccuracy materially increases the Buyer's good faith estimate of the cost or time to develop the Property. Failure of such a condition to Closing shall entitle Buyer to terminate this Agreement at Closing and receive a refund of the Earnest Money, whereupon both parties shall be released from further liability under this Agreement, except as expressly provided in this Agreement to survive. If Buyer does not elect to so terminate, Buyer shall timely proceed to Closing and the failure of such condition to Closing shall be deemed waived.

(c) Actual Knowledge of Seller. When used in this Agreement, the term "actual knowledge of Seller" (or words of similar import) shall mean and be limited to the actual (and not imparted, implied or constructive) current knowledge of Scot Rigby and Douglas Tessendorf. Notwithstanding anything herein to the contrary, Mr. Rigby and Mr. Tessendorf are not a party to this Agreement and shall not have any personal liability or liability whatsoever with respect to any matters set forth in this Agreement or Seller's representations and/or warranties herein being or becoming untrue, inaccurate or incomplete in any respect.

## 9.2 Representations and Warranties of Buyer. Buyer represents that:

(a) The person or persons executing this Agreement on behalf of Buyer are duly authorized to do so and thereby bind Buyer hereto without the signature of any other party.

(b) Buyer has all requisite power and authority to enter into and perform this Agreement and to incur the obligations provided for herein and has taken all action necessary to

authorize the execution, delivery and performance of this Agreement, subject to the express terms and limitations in this Agreement. Buyer is a duly formed Delaware limited liability company and has completed all necessary requirements in Arizona to be authorized to do business as a foreign corporation in Arizona.

(c) This Agreement is valid, binding and enforceable in accordance with its terms.

(d) The execution, delivery and performance of this Agreement by Buyer does not result in any violation of, and does not conflict with or constitute a default under, any present agreement, mortgage, deed of trust, indenture, credit extension agreement; license, security agreement or other instrument to which Buyer is a party, or any judgment, decree, order; statute, rule or governmental regulation.

(e) No approvals or consents by third parties or governmental authorities are required in order for Buyer to consummate the transactions contemplated hereby.

9.3 Survival. Each of the representations and warranties contained in Sections 9.1 and 9.2, whether made by Seller or Buyer, shall be true and correct as of the Closing (subject to modification as expressly permitted by this Agreement) and shall survive the Closing and the delivery of the Deed to Buyer for a period of three (3) years.

## **ARTICLE 10**

### **RELEASE**

10.1 Release from Representations and Warranties. Except as is otherwise expressly provided in this Agreement, Seller hereby specifically disclaims any warranty (oral or written) concerning (1) the nature and condition of the Property and its suitability for any and all activities and uses that Buyer may elect to conduct on the Property; (ii) the manner, construction, condition and state of repair or lack of repair of any improvements located on the Property; (iii) the nature and extent of any right-of-way, lien, encumbrance, license, reservation, condition, or otherwise; (iv) the compliance of the Property or its operation with any laws, rules, ordinances or regulations of any government or other body, it being specifically understood that Buyer shall have full opportunity during the Feasibility Period, to determine for itself the condition of the Property; and (v) any other matter whatsoever except as expressly set forth in this Agreement. Except as is otherwise expressly provided in this Agreement, the sale of the Property as provided for in this Agreement is made on a strictly "AS IS" "WHERE IS" basis as of the Closing Date. Except as otherwise expressly provided in this Agreement, Buyer expressly acknowledges that, in consideration of the agreements of Seller in this Agreement, SELLER MAKES NO WARRANTY OR REPRESENTATION, EXPRESS OR IMPLIED, OR ARISING BY OPERATION OF LAW, INCLUDING, BUT IN NO WAY LIMITED TO, ANY WARRANTY OF QUANTITY; QUALITY; CONDITION, HABITABILITY, MERCHANTABILITY, SUITABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE PROPERTY, ANY IMPROVEMENTS LOCATED ON THE PROPERTY OR ANY SOIL CONDITIONS RELATED TO THE PROPERTY. BUYER SPECIFICALLY ACKNOWLEDGES THAT BUYER IS NOT RELYING ON (AND SELLER HEREBY DISCLAIMS AND RENOUNCES)

ANY REPRESENTATIONS OR WARRANTIES MADE BY OR ON BEHALF OF SELLER OF ANY KIND OR NATURE WHATSOEVER, EXCEPT AS IS OTHERWISE EXPRESSLY PROVIDED IN THIS AGREEMENT. FURTHER, EXCEPT AS OTHERWISE EXPRESSLY PROVIDED IN THIS AGREEMENT, BUYER, FOR BUYER AND BUYER'S SUCCESSORS AND ASSIGNS, HEREBY RELEASES SELLER FROM AND WAIVES ANY AND ALL CLAIMS AND LIABILITIES AGAINST SELLER FOR, RELATED TO, OR IN CONNECTION WITH, ANY ENVIRONMENTAL CONDITION AT THE PROPERTY (OR THE PRESENCE OF ANY MATTER OR SUBSTANCE RELATING TO THE ENVIRONMENTAL CONDITION OF THE PROPERTY), INCLUDING, BUT NOT LIMITED TO, CLAIMS AND/OR LIABILITIES RELATING TO (IN ANY MANNER WHATSOEVER) ANY HAZARDOUS, TOXIC OR DANGEROUS MATERIALS OR SUBSTANCES LOCATED IN, AT, ABOUT OR UNDER THE PROPERTY, OR FOR ANY AND ALL CLAIMS OR CAUSES OF ACTION (ACTUAL OR THREATENED) BASED UPON, IN CONNECTION WITH OR ARISING OUT OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT, 42 U.S.C. § 9601, *ET SEQ.* ("CERLA"); THE RESOURCE CONSERVATION AND RECOVERY ACT, 42 U.S.C. § 6901, *ET SEQ.* ("RCRA"); AND THE SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT, 42 U.S.C. § 9601, *ET SEQ.* ("SARA") OR ANY OTHER CLAIM OR CAUSE OF ACTION (INCLUDING ANY FEDERAL OR STATE BASED STATUTORY, REGULATORY OR COMMON LAW CAUSE OF ACTION) RELATED TO ENVIRONMENTAL MATTERS OR LIABILITY WITH RESPECT TO OR AFFECTING THE PROPERTY. BUYER REPRESENTS TO SELLER THAT BUYER HAS CONDUCTED, OR WILL CONDUCT BEFORE CLOSING, SUCH INVESTIGATIONS OF THE PROPERTY, INCLUDING, BUT NOT LIMITED TO, THE PHYSICAL AND ENVIRONMENTAL CONDITIONS THEREOF, AS BUYER DEEMS NECESSARY TO SATISFY ITSELF AS TO THE CONDITION OF THE PROPERTY AND THE EXISTENCE OR NONEXISTENCE OR CURATIVE ACTION TO BE TAKEN WITH RESPECT TO ANY HAZARDOUS OR TOXIC SUBSTANCES ON OR DISCHARGED FROM THE PROPERTY AND WILL RELY SOLELY ON SAME AND NOT ON ANY INFORMATION PROVIDED BY OR ON BEHALF OF SELLER OR ITS AGENTS OR EMPLOYEES WITH RESPECT THERETO, OTHER THAN SUCH REPRESENTATIONS, WARRANTIES, AND COVENANTS OF SELLER AS ARE EXPRESSLY SET FORTH IN THIS AGREEMENT. UPON CLOSING, EXCEPT AS OTHERWISE EXPRESSLY PROVIDED HEREIN, BUYER SHALL ASSUME THE RISK THAT ADVERSE MATTERS, INCLUDING, *BUT NOT* LIMITED TO, CONSTRUCTION DEFECTS AND ADVERSE PHYSICAL AND ENVIRONMENTAL CONDITIONS, MAY NOT HAVE BEEN REVEALED BY BUYER'S INVESTIGATIONS, AND BUYER, ON CLOSING, SHALL BE DEEMED TO HAVE WAIVED, RELINQUISHED, AND RELEASED SELLER FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, CAUSES OF ACTION (INCLUDING CAUSES OF ACTION IN TORT), LOSSES, DAMAGES, LIABILITIES, COSTS, AND EXPENSES (INCLUDING ATTORNEYS' FEES AND COURT COSTS) OF ANY AND EVERY KIND OR CHARACTER, KNOWN OR UNKNOWN, THAT BUYER MIGHT HAVE ASSERTED OR ALLEGED AGAINST SELLER, AT ANY TIME BY REASON OF OR ARISING OUT OF ANY LATENT OR PATENT CONSTRUCTION DEFECTS OR PHYSICAL CONDITIONS, VIOLATIONS OF ANY APPLICABLE LAWS (INCLUDING, WITHOUT LIMITATION, ANY ENVIRONMENTAL LAWS) AND ANY

AND ALL OTHER ACTS, OMISSIONS, EVENTS, CIRCUMSTANCES, OR MATTERS REGARDING THE PROPERTY EXCEPT AS OTHERWISE EXPRESSLY PROVIDED IN THIS AGREEMENT, BUYER AGREES THAT SHOULD ANY CLEANUP, REMEDIATION, OR REMOVAL OF HAZARDOUS SUBSTANCES OR OTHER ENVIRONMENTAL CONDITIONS ON THE PROPERTY BE- REQUIRED AFTER THE DATE OF CLOSING, SUCH CLEANUP, REMOVAL, OR REMEDIATION SHALL BE THE RESPONSIBILITY OF AND SHALL BE PERFORMED AT THE SOLE COST AND EXPENSE OF BUYER.

Buyer acknowledges and agrees that the provisions contained in this Section 10.1 were a material factor in Seller's acceptance of the sales price and that Seller was unwilling to sell the property to Buyer unless Seller was released as expressly set forth above. BUYER, WITH BUYER'S COUNSEL, HAS FULLY REVIEWED THE DISCLAIMERS AND WAIVERS SET FORTH IN THIS AGREEMENT AND UNDERSTANDS THEIR SIGNIFICANCE AND EFFECT. BUYER ACKNOWLEDGES AND AGREES THAT THE DISCLAIMERS AND OTHER AGREEMENTS SET FORTH IN THIS AGREEMENT ARE AN INTEGRAL PART OF THIS AGREEMENT; AND THAT SELLER WOULD NOT HAVE AGREED TO SELL THE PROPERTY TO BUYER FOR THE SALES PRICE WITHOUT THE DISCLAIMERS AND OTHER AGREEMENTS SET FORTH IN THIS AGREEMENT. THE TERMS AND CONDITIONS OF THIS SECTION 10.1 WILL EXPRESSLY SURVIVE THE CLOSING, ARE NOT SUBJECT TO THE TIME LIMITATION SET FORTH IN SECTION 9.3 AND WILL NOT MERGE WITH THE PROVISIONS OF ANY CLOSING DOCUMENTS.

## **ARTICLE 11**

### **REMEDIES**

11.1 Seller's Remedies. If Buyer fails to deposit the Closing Payment (as defined in Section 2.1(b)) in the time and manner set forth in this Agreement or to perform when due any other act required by this Agreement, then provided that Seller has fully performed its obligations in accordance with this Agreement, Seller's sole and exclusive remedy shall be to (1) cancel this Agreement and the Escrow, such cancellation to be effective immediately upon Seller giving written notice of cancellation to Buyer and Escrow Agent and (ii) to receive the Earnest Money paid pursuant to Section 2.1(a) from Buyer as liquidated damages and not as a penalty, the parties agreeing and hereby stipulating that the exact amount of damages would be extremely difficult to ascertain and that such amount constitutes a reasonable and fair approximation of such damages. Immediately following Seller's cancellation as described herein and without further instructions from Buyer, the Earnest Money shall be released by Escrow Agent to Seller in payment of the liquidated damages amount payable to Seller pursuant to this Section 11.1. Following such cancellation and payment of the liquidated damage amount, both parties shall be relieved of and released from any further liability under this Agreement, except that in addition to payment of the liquidated damage amount, (i) the indemnification obligations of Buyer set forth in this Agreement and in the Access Agreement shall survive the cancellation and shall be performable and owing by Buyer to Seller; and (ii) Seller shall also have the right (if it is the prevailing party) to collect from Buyer all costs and expenses (including, without limitation, reasonable attorneys' fees and expenses) incurred by Seller if Buyer disputes Seller's right to cancel this transaction and receive liquidated damages as provided herein.

11.2 Buyer's Remedies. If Seller fails to perform when due any act required by this Agreement to be performed, then, provided Buyer has fully performed its obligations in accordance with this Agreement, Buyer may elect as its sole remedy hereunder either to (1) cancel this Agreement and the Escrow and receive the return of all Earnest Money (and Escrow Agent is hereby instructed to deliver any such amounts in Escrow to Buyer), such cancellation to be effective immediately upon Buyer giving written notice of cancellation to Seller and Escrow Agent, or (ii) seek specific performance of this Agreement, provided that no such action for specific performance shall require Seller to do any of the following: (a) change the condition of the Property or restore any improvement on the Property after any fire or other casualty; or (b) expend money or post a bond to remove a title encumbrance or defect or to correct any matter shown on a survey or title report covering the Property. Buyer shall also have the right (if it is the prevailing party) to collect from Seller all costs and expenses (including, without limitation, reasonable attorneys' fees and expenses) incurred by Buyer if (1) Seller disputes Buyer's right to receive the return of the Earnest Money in the event of Seller's default as described herein and Buyer's election to cancel this Agreement and receive the Earnest Money, or (2) Buyer seeks and obtains specific performance of this Agreement. In no event shall Buyer be entitled to seek or recover monetary damages from Seller and Buyer hereby waives its right to do so.

11.3 Notice of Breach; Remedies. In the case of an alleged breach of this Agreement by either party, the party shall not be considered to be in breach and no remedies may be pursued for such breach until a written notice describing the alleged breach and the action required to cure the breach has been given to the allegedly defaulting party and such party has failed to cure the default within ten (10) days thereafter. Notwithstanding any contrary provision of this Agreement, the provisions of Article 11 shall not limit the parties' rights in connection with any indemnity granted pursuant to this Agreement or the Access Agreement, or limit Seller's rights to collect any amounts payable by Buyer to Seller pursuant to Section 2.1.

## **ARTICLE 12**

### **GENERAL PROVISIONS**

12.1 Certain Definitions. As used in this Agreement, certain capitalized terms are defined as follows:

(a) "Affiliate" means, with respect to Buyer, any company, partnership, or corporation which (i) directly or indirectly controls Buyer, (ii) is directly or indirectly controlled by Buyer, or (iii) is directly or indirectly controlled by a company or corporation which directly or indirectly controls Buyer, where "control" means the right to exercise votes attaching to more than fifty percent (50%) of the voting shares of the company, partnership or corporation in question.

(b) "Claims" means any and all obligations, debts, covenants, conditions, representations, costs, and liabilities and any and all demands, causes of action, and claims, of every type, kind, nature or character, direct or indirect, known or unknown, absolute or contingent, determined or speculative, at law, in equity or otherwise, including attorneys' fees and litigation and court costs.

(c) "Related Parties" means, with respect to any person or entity, the officers, directors, shareholders, partners, members, employees, agents, attorneys, successors, personal representatives, heirs, executors, or assigns of any such person or entity.

12.2 Assignment. Buyer may not assign or transfer its rights under this Agreement without the prior written consent of Seller, which may be given or withheld in Seller's sole discretion. Notwithstanding the foregoing, Buyer shall be entitled to assign its rights under this Agreement to an Affiliate. In connection with any assignment approved by Seller or to an Affiliate of Buyer as permitted herein, (a) the assignee shall assume the obligations of Buyer hereunder pursuant to an assignment agreement which inures to the benefit of and is enforceable by Seller, and (b) Seller shall be provided with an executed copy of the assignment agreement at least fifteen (15) days prior to the Closing.

12.3 Binding Effect. Except as limited by Section 12.2, the provisions of this Agreement are binding upon and will inure to the benefit of the parties and their respective heirs, personal representatives, successors and assigns.

12.4 Attorneys' Fees. In any suit, action, or proceeding (a) to enforce and/or defend this Agreement or any modification hereof; (b) to interpret this Agreement or any modification hereof, and/or (c) arising out of or having its roots in this Agreement or any modification hereof, the Prevailing Party shall be entitled to recover from the non-prevailing party reasonable attorneys' fees, costs of suit, and any other relief granted by the court, whether or not any judgment is entered. "Prevailing Party" within the meaning of this Section includes, without limitation, a party who agrees to dismiss an action or proceeding upon the other's payment of the sums allegedly due or performance of the covenants allegedly breached, or who obtains substantially the relief sought by it.

12.5 Waivers. No waiver of any of the provisions of this Agreement will constitute a waiver of any other provision, whether or not similar, nor will any waiver be a continuing waiver. No waiver will be binding unless executed in writing by the party making the waiver. Either party may waive any provision of this Agreement intended for its benefit; provided, however, such waiver will in no way excuse the other party from the performance of any of its other obligations under this Agreement.

12.6 Construction. This Agreement will be construed according to the laws of the State of Arizona, without giving effect to its conflict of laws principles. References in this Agreement to "Sections" or "Articles" are to the Sections and Articles in this Agreement, unless otherwise noted.

12.7 Time. Time is of the essence of this Agreement.

12.8 Notices.

(a) Notices will be in writing and will be given by personal delivery, by deposit in the United States mail, certified mail, return receipt requested, postage prepaid, by facsimile transmission, or by express delivery service, freight prepaid. Notices will be delivered

or addressed to Seller and Buyer at the addresses or facsimile numbers set forth on the first page of this Agreement or at such other address or number as a party may designate in writing. The date notice is deemed to have been given, received and become effective will be (a) the date on which the notice is delivered, if notice is given by personal delivery, (b) the date of actual receipt, if the notice is sent through the United States mail or by express delivery service, or (c) if notice is sent by facsimile transmission, on the date of transmission, if the transmission is - commenced prior to 5:00 o'clock p.m. (local time at the place of receipt) and continuously transmitted thereafter until complete, otherwise on the day following the date of transmission.

(b) Copies of all notices shall also be provided as follows:

Buyer's Attorney: W. Ralph Pew  
Pew & Lake PLC  
1930 E. Brown Rd. Suite 101  
Mesa, AZ 852003  
Facsimile: (480) 461-4676

Seller's Attorney: Deborah J. Spinner  
City of Mesa  
City Attorney  
20 East Main Street, Suite 850  
Mesa, AZ 85211  
Facsimile: (480) 644-2498

12.9 Further Documentation. Each party agrees in good faith to execute such further or additional documents as may be necessary or appropriate to fully carry out the intent and purpose of this Agreement.

12.10 Time Periods. Except as expressly provided for in this Agreement, the time for performance of any obligation or taking any action under this Agreement will be deemed to expire at 5:00 o'clock p.m. (Mountain Standard Time) on the last day of the applicable time period provided for in this Agreement. If the time for the performance of any obligation or taking any action under this Agreement expires on a Saturday, Sunday or legal holiday of the City of Mesa, the time for performance or taking such action will be extended to the next succeeding day which is not a Saturday, Sunday or legal holiday of the City of Mesa.

12.11 Headings and Counterparts. The headings of this Agreement are for purposes of reference only and will not limit or define the meaning of any provision of this Agreement. This Agreement may be executed in any number of counterparts, each of which will be an original but all of which will constitute one and the same instrument.

12.12 Entire Agreement. This Agreement, which includes the following Exhibits:

Exhibit A	Legal Description of Real Property
Exhibit B	Promissory Note

Exhibit C	Deed of Trust
Exhibit D	Access Agreement
Exhibit E	Special Warranty Deed

constitutes the entire agreement between the parties pertaining to the subject matter contained in this Agreement. All prior and contemporaneous agreements, representations and understandings of the parties, oral or written, are superseded by and merged in this Agreement. No supplement, modification or amendment of this Agreement will be binding unless in writing and executed by Buyer and Seller.

12.13 Compliance with State Law Restrictions. The obligations of Seller, pursuant to the provisions of this Agreement which require the expenditure of funds do not constitute a general obligation or indebtedness of Seller within the meaning of any constitutional or statutory debt limitation or restriction, and do not obligate Seller to make any expenditure from proceeds from ad valorem taxes or obligations to which any general taxing authority is pledged or from its general funds unless the expenditure has been duly budgeted if and to the extent required bylaw and is within all budget and expenditure limitations of, and is not in conflict with, the Constitution or laws of the State of Arizona.

12.14 Applicability of Certain Statutes. Notice is hereby given of the applicability of A.R.S. § 12-133, § 12-1518, and § 38-511.

12.15 Nondiscrimination. Buyer and Seller agree to comply with all applicable state and federal laws, rules, regulations and executive orders governing equal employment opportunity, immigration, nondiscrimination, including the Americans with Disabilities Act, and affirmative action.

12.16 Records. To the extent required by A.R.S. § 35-214, Buyer and Seller agree to retain all records relating to this Agreement and to make those records available at all reasonable times for inspection and audit by the other party or the Auditor General of the State of Arizona during the term of this Agreement and for a period of five (5) years after the completion of this Agreement. The records shall be provided at a location designated by the requesting party upon reasonable notice to the other.

*[The remainder of the page has been intentionally left blank. All signatures appear on the following page.]*

Buyer and Seller have executed this Agreement as of the date first above written.

SELLER:

City of Mesa, an Arizona municipal corporation

\_\_\_\_\_  
Christopher J. Brady  
City Manager

Pursuant to Resolution of the Mayor and Council  
adopted \_\_\_\_\_.

BUYER:

WAVEYARD DEVELOPMENT, LLC, a Delaware  
LLC

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

The undersigned Escrow Agent accepts the  
engagement to handle the Escrow on the terms  
and conditions described herein.

\_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
"Escrow Agent"

OPENING DATE: \_\_\_\_\_

**EXHIBIT A**  
**LEGAL DESCRIPTION**

**EXHIBIT "A"**  
**WAVEYARD**  
**PRELIMINARY PROJECT BOUNDARY**

THAT PART OF THE SOUTHEAST QUARTER OF THE NORTHEAST QUARTER OF SAID 18 AND THAT PART OF THE NORTHEAST QUARTER OF THE SOUTHEAST QUARTER OF SAID SECTION 18 AND THAT PART OF THE NORTHEAST QUARTER OF THE NORTHEAST QUARTER OF SECTION 18 AND THAT PART OF THE NORTHWEST QUARTER OF SECTION 18 AND THAT PART OF THE SOUTHWEST QUARTER OF THE NORTHEAST QUARTER OF SECTION 18 AND THAT PART OF THE NORTHWEST QUARTER OF SECTION 17 DESCRIBED AS FOLLOWS, THE COURSES GIVEN BEING BASED ON AN ASSUMED COURSE OF EAST FOR THE SOUTH LINE OF THE SOUTHEAST QUARTER OF SAID SECTION 18, TO-WIT:

**BEGINNING** AT THE EAST QUARTER SECTION CORNER OF SAID SECTION 18;

**THENCE** NORTH 0 DEGREES 56 MINUTES 23 SECONDS EAST ALONG THE SECTION LINE 45.01 FEET;

**THENCE** IN A WESTERLY DIRECTION SOUTH 89 DEGREES 29 MINUTES 09 SECONDS 1091.82 FEET TO A **POINT OF BEGINNING**;

**THENCE** IN A WESTERLY DIRECTION SOUTH 89 DEGREES 27 MINUTES 09 SECONDS WEST 1587.39 FEET;

**THENCE** IN A WESTERLY DIRECTION SOUTH 89 DEGREES 25 MINUTES 46 SECONDS WEST 1613.72 FEET;

**THENCE** IN A NORTHERLY DIRECTION NORTH 01 DEGREES 40 MINUTES 11 SECONDS WEST 293.12 FEET;

**THENCE** IN A WESTERLY DIRECTION SOUTH 89 DEGREES 30 MINUTES 34 SECONDS WEST 378.63 FEET;

**THENCE** IN A WESTERLY DIRECTION SOUTH 89 DEGREES 30 MINUTES 34 SECONDS WEST 26.21 FEET;

**THENCE** IN A NORTHEASTERLY DIRECTION NORTH 33 DEGREES 15 MINUTES 30 SECONDS EAST 261.71 FEET;

**THENCE** IN A NORTHEASTERLY DIRECTION NORTH 13 DEGREES 48 MINUTES 16 SECONDS EAST 286.14 FEET;

**THENCE** IN A NORTHEASTERLY DIRECTION NORTH 64 DEGREES 23 MINUTES 35 SECONDS EAST 665.74 FEET;

**THENCE** IN A NORTHEASTERLY DIRECTION NORTH 60 DEGREES 21 MINUTES 57 SECONDS EAST 428.51 FEET;

**THENCE** IN A NORTHEASTERLY DIRECTION NORTH 76 DEGREES 38 MINUTES 49 SECONDS EAST 220.72 FEET;

**THENCE** IN A NORTHEASTERLY DIRECTION NORTH 63 DEGREES 27 MINUTES 32 SECONDS EAST 435.15 FEET;

**THENCE** IN A EASTERLY DIRECTION NORTH 87 DEGREES 50 MINUTES 34 SECONDS EAST 231.33 FEET;

**THENCE** IN A SOUTHERLY DIRECTION SOUTH 00 DEGREES 16 MINUTES 13 SECONDS EAST 256.64 FEET;

**THENCE** IN A EASTERLY DIRECTION NORTH 89 DEGREES 43 MINUTES 47 SECONDS EAST 255.62 FEET;

**THENCE** IN A EASTERLY DIRECTION SOUTH 79 DEGREES 45 MINUTES 07 SECONDS EAST 110.05 FEET;

**THENCE** IN A EASTERLY DIRECTION NORTH 89 DEGREES 43 MINUTES 47 SECONDS EAST 1288.80 FEET;

**THENCE** IN A NOTHERLY DIRECTION NORTH 00 DEGREES 19 MINUTES 56 SECONDS EAST 765.59 FEET;

**THENCE** IN A NORTHEASTERLY DIRECTION NORTH 72 DEGREES 12 MINUTES 48 SECONDS EAST 982.53 FEET;

**THENCE** IN A SOUTHERLY DIRECTION SOUTH 00 DEGREES 58 MINUTES 08 SECONDS WEST 171.42 FEET;

**THENCE** IN A EASTERLY DIRECTION SOUTH 89 DEGREES 03 MINUTES 28 SECONDS EAST 130.08 FEET;

**THENCE** IN A SOUTHERLY DIRECTION SOUTH 00 DEGREES 56 MINUTES 23 SECONDS WEST 771.68 FEET;

**THENCE** IN A SOUTHWESTERLY DIRECTION SOUTH 65 DEGREES 24 MINUTES 15 SECONDS WEST 1258.05 FEET;

**THENCE** IN A SOUTHERLY DIRECTION SOUTH 02 DEGREES 03 MINUTES 07 SECONDS EAST 837.33 FEET TO THE **POINT OF BEGINNING**.

### **LEASED PROPERTY**

**BEGINNING** AT THE EAST QUARTER SECTION CORNER OF SAID SECTION 18;

**THENCE** IN A WESTERLY DIRECTION SOUTH 89 DEGREES 29 MINUTES 09 SECONDS WEST ALONG THE SOUTH LINE OF MID SECTION LINE 1039.12 FEET;

**THENCE** DEPARTING SAID MID SECTION LINE IN A NORTHERLY DIRECTION NORTH 00 DEGREES 19 MINUTES 56 SECONDS EAST 1284.34 FEET TO A **POINT OF BEGINNING**;

**THENCE** IN A WESTERLY DIRECTION SOUTH 89 DEGREES 43 MINUTES 47 SECONDS WEST 340.65 FEET;

**THENCE** IN A NORTHERLY DIRECTION NORTH 00 DEGREES 06 MINUTES 05 SECONDS EAST 38.83 FEET;

**THENCE** IN A NORTHERLY DIRECTION NORTH 13 DEGREES 46 MINUTES 36 SECONDS WEST 35.97 FEET;

**THENCE** IN A EASTERLY DIRECTION NORTH 76 DEGREES 13 MINUTES 24 SECONDS EAST 1.57 FEET;

**THENCE** IN A NORTHEASTERLY DIRECTION NORTH 25 DEGREES 05 MINUTES 21 SECONDS EAST 32.12 FEET;

**THENCE** IN A EASTERLY DIRECTION NORTH 77 DEGREES 45 MINUTES 49 SECONDS EAST 1.72 FEET;

**THENCE** IN A NORTHERLY DIRECTION NORTH 12 DEGREES 14 MINUTES 11 SECONDS WEST 38.15 FEET;

**THENCE** IN A NORTHERLY DIRECTION NORTH 00 DEGREES 06 MINUTES 05 SECONDS EAST 493.23 FEET;

**THENCE** IN A EASTERLY DIRECTION NORTH 88 DEGREES 40 MINUTES 32 SECONDS EAST 43.91 FEET TO A POINT OF INTERSECTION WITH A CURVE CONCAVE TO THE NORTH;

**THENCE** NORTHEASTERLY, 25.51 FEET ALONG THE ARC OF SAID CURVE, SAID CURVE HAVING A RADIUS OF 100.00 FEET, A CENTRAL ANGLE OF 14 DEGREES 36 MINUTES 54 SECONDS AND A CHORD THAT BEARS NORTH 81 DEGREES 22 MINUTES 05 SECONDS EAST A DISTANCE OF 25.44 FEET;

**THENCE** IN A EASTERLY DIRECTION NORTH 74 DEGREES 03 MINUTES 38 SECONDS EAST 76.50 FEET TO A POINT OF INTERSECTION WITH A CURVE CONCAVE TO THE SOUTHEAST;

**THENCE** EASTERLY, 29.98 FEET ALONG THE ARC OF SAID CURVE, SAID CURVE HAVING A RADIUS OF 112.00 FEET, A CENTRAL ANGLE OF 15 DEGREES 20 MINUTES 12 SECONDS AND A CHORD THAT BEARS NORTH 81 DEGREES 43 MINUTES 44 SECONDS EAST A DISTANCE OF 29.89 FEET;

**THENCE** IN A EASTERLY DIRECTION NORTH 89 DEGREES 23 MINUTES 50 SECONDS EAST 52.68 FEET;

**THENCE** IN A NORTHERLY DIRECTION NORTH 00 DEGREES 36 MINUTES 10 SECONDS WEST 63.88 FEET;

**THENCE** IN A EASTERLY DIRECTION NORTH 72 DEGREES 10 MINUTES 19 SECONDS EAST 125.81 FEET;

**THENCE** IN A SOUTHERLY DIRECTION SOUTH 00 DEGREES 19 MINUTES 56 SECONDS WEST 765.59 FEET TO THE **POINT OF BEGINNING**.

**PROPERTY LINE SKETCH  
OF EXHIBIT 'A'**

DATE:	SHEET 1 OF 1
05-30-2007	NOT TO SCALE

NORTH WEST CORNER OF  
SECTION 18, T.1N.,R.5E

NORTH EAST CORNER OF  
SECTION 18, T.1N.,R.5E

LEASE PROPERTY  
5.3 ACRES ±

WAVEYARD  
120.6 ACRES ±

WEST HALF  
SECTION OF  
SECTION 18,  
T.1N.,R.5E

POINT OF  
BEGINNING

8TH STREET

DOBSON ROAD



**EXHIBIT B**  
**PROMISSORY NOTE**

\$20,000,000.00

Mesa, Arizona

\_\_\_\_\_, 2007

FOR VALUE RECEIVED, the undersigned promises to pay to the order of the City of Mesa, Arizona, a municipal corporation ("Holder"), at 20 East Main Street, Suite 750, Mesa, Arizona 85211, or to such other persons or places as may be designated from time to time by notice to the undersigned, the principal sum of Twenty Million and no/100 Dollars (\$20,000,000.00), together with interest on the principal balance from time to time outstanding at an annual rate of interest equal to four and four-tenths (4.4%) per annum. Interest is to be charged on a daily basis on the unpaid principal amount for the actual number of days that principal is outstanding from the date hereof until paid.

1. No payments shall be required for the first four years after the date of this Note. However, interest shall accrue on the unpaid principal balance of this Note until the fourth (4<sup>th</sup>) anniversary of this Note. Accrued interest shall be added to, and shall increase, the unpaid principal balance of this Note and shall be compounded annually.

2. Commencing on the fourth (4<sup>th</sup>) anniversary of this Note, the undersigned shall make monthly payments of the unpaid principal balance of this Note and interest at the rate set forth above, which payments shall be fully amortized on the basis of a twenty-year term and shall be paid to the Holder on or before the \_\_\_\_\_ day of every month thereafter until this Note, and all unpaid interest and other amounts payable hereunder, have been paid in full. The entire unpaid principal balance of this Note, all accrued and unpaid interest and all other amounts payable hereunder (the "Final Payment") shall be paid in full on or before the twentieth (20<sup>th</sup>) anniversary of this Note (the "Due Date").

3. The undersigned shall have the right from time to time to prepay the whole or any part of the principal sum hereof without penalty, bonus or other prepayment charges, provided all interest hereon is paid to the date of prepayment. Any prepayments of principal made shall be applied in the inverse order of maturity.

4. The undersigned promises to pay a late payment charge of ten percent (10%) of the amount of each payment if such payment required to be made hereunder is not received by the Holder within ten (10) days after the due date of such payment; provided however that such charge shall not apply with respect to monthly Rebates being credited by Maker against any monthly payment obligation described in Section 2 above, or against any Shortfall.

5. All payments made hereunder shall be applied in the following order, to the extent applicable: late fees, interest, reasonable costs and attorneys' fees incurred by the Holder for collection, principal then due, and the balance to a reduction of principal in the order set forth above for prepayments. Upon any default by the undersigned hereunder which is not cured within ten (10) days after written notice of such default, or upon any default under the Deed of Trust securing this Note, at the option of Holder without further notice or demand to the

undersigned, the balance of all amounts outstanding hereunder shall become immediately due and payable, in which event the Holder here-of may immediately proceed to take any remedies available to Holder hereunder or under the Deed of Trust securing this Note. The whole of the principal sum, together with costs and attorneys' fees, shall bear interest at the rate of eighteen per-cent (18%) per annum ("Default Rate") after default (until such default is cured) and from and after maturity, whether or not resulting from acceleration. The payment and acceptance of any sums at any time, or the failure to exercise any rights herein given the Holder, shall not constitute a waiver of the Holder's rights in the event of any subsequent default.

6. In the event the Holder hereof utilizes the services of an attorney in attempting to collect the amounts due hereunder or to enforce the terms hereof or of any agreements related to this indebtedness, or if the Holder hereof becomes party in any legal proceeding for the recovery or protection of the indebtedness evidenced hereby, the undersigned and any endorsers and guarantors hereof agree to pay, in addition to the principal and interest due hereon, all costs and a reasonable amount as attorneys' fees, whether or not suit is brought, and shall further pay all costs, expenses and attorneys' fees incurred after the filing by or against the undersigned of any proceeding under any chapter of the federal bankruptcy code or any similar federal or state statute.

7. The undersigned, any endorsers and any guarantors severally waive all applicable exemption rights, whether under the state constitution, homestead laws or otherwise, and also severally waive valuation and appraisal, demand, presentment, protest and demand, notice of protest, demand and dishonor and non-payment of this Note and all other notice of any kind, and expressly agree that the maturity of this Note, or any payment hereunder, may be extended from time to time without in any way affecting the liability of the undersigned or said endorsers and guarantors.

8. The rate of interest agreed to shall include the interest rate as shown above in accordance with the terms of this Note, plus any additional charges, costs and fees incident to this Note, the Deed of Trust or any guarantee to the extent they are deemed to be interest under applicable law. No provision of this Note or any instrument securing this Note shall be deemed to require the payment or permit the collection of interest in excess of the maximum permitted by law. If any excess of interest in such respect is herein provided for, or shall be adjudicated to be so provided for herein, for whatever reason, the interest required to be paid here-under shall be automatically reduced to the maximum legally enforceable and any excess paid over such maximum enforce-able amount shall be automatically credited against any other indebtedness of the undersigned to the Holder hereof, and, thereafter, any remaining amount refunded to the undersigned in cash, which amount the undersigned agrees to accept.

9. Should this Note be signed by more than one maker, the singular shall include the plural and all the obligations herein contained shall be the joint and several obligations of each signer hereof.

10. The undersigned hereby agrees that this Note shall be governed by the laws of the State of Arizona and secured at all times by that certain Deed of Trust of even date herewith (the "Deed of Trust") on certain property located in Maricopa County, Arizona, as more particularly described in the Deed of Trust. In addition, at the time of delivery of this Note to Holder, Maker

shall deliver a letter of credit (the "LOC") to Holder, in a form reasonably acceptable to Holder and issued by a national banking association reasonably acceptable to Holder, in an amount equal to one-year's worth of amortized payments of principal and interest (the "LOC Amount"), as further security for Maker's repayment of this Note. The LOC, if not issued for the full term of this Note, shall be renewed annually by Maker (with written evidence of such renewal being delivered to Holder) and shall not be permitted to expire without at least thirty (30) days' prior written notice from the issuing bank to Holder. Holder shall be permitted to draw (i) against the full amount of the LOC if the LOC has not been timely renewed in accordance with this Section 10, or (ii) against the LOC in the amount of any Shortfall if Holder does not timely pay such Shortfall in accordance with Section 11 below, or (iii) against the LOC in the amount of any required payment from Maker if Holder is not obligated to credit Rebates to Maker pursuant to Section 11 below. All funds paid to Holder from the LOC shall be credited to payment of this Note as provided for herein. In the event that Holder has drawn against all or a portion of the LOC, then Maker immediately shall restore the LOC to the LOC Amount, or deliver a new LOC to Holder; and Maker's failure to do so within thirty (30) days' of the expiration of, or draw against, the LOC, shall be a default by Maker under this Note entitling Holder to invoke any and all remedies available to Holder with respect to such default.

11. Holder and Maker have executed a "Development Agreement" (the "Agreement") dated June \_\_, 2007, that obligates Holder, upon satisfaction of certain conditions by Maker, to credit Maker with certain rebates ("Rebates" or, individually, a "Rebate") of Reimbursable Sales Taxes (as defined in the Agreement) against the payments owing by Maker to Holder pursuant to this Note, but only to the extent such Reimbursable Sales Taxes have been received by Holder. Because of seasonal variations of income from the Project (as defined in the Agreement), from which the sums constituting a portion of the Rebates shall be generated, Rebates either (i) may exceed, with respect to any month, the minimum required amortized payment of principal and interest (and all other amounts) required by this Note, or (ii) may be less than the minimum required amortized payment of principal and interest (and all other amounts) required by this Note. Accordingly, Maker and Holder have agreed to a procedure that permits the Holder to credit Rebates, on a monthly basis, to all amounts then owing to Holder from Maker pursuant to the Note, but with a final determination to be made on an annual basis, commencing on and after the first anniversary of this Note, and on the same annual anniversary of each year thereafter, until this Note has been paid and discharged in full, but in no event beyond the Due Date. If Rebates, for any such annual period, exceed the amounts that are owing from Maker to Holder for such annual period, then any excess shall be applied by Holder to any unpaid principal balance of this Note. If Rebates, for any such annual period, are less than the amounts that are owing from Maker to Holder for such annual period, then Maker, upon five (5) business days' notice from Holder, shall pay to Holder all amounts owing pursuant to this Note for such annual period in excess of the Rebates credited by Holder for such annual period (a "Shortfall"). Subject to the foregoing procedure, Maker agrees, acknowledges and confirms that it is obligated timely to make any and all payments of principal and interest required by this Note if Rebates do not exist, or exist in insufficient amounts to satisfy the payment obligations required by this Note.

WAVEYARD DEVELOPMENT, LLC,  
a Delaware limited liability company

By: \_\_\_\_\_  
Richard Mladick, Manager

By: \_\_\_\_\_  
Jerry Hug, Manager

WHEN RECORDED, MAIL TO:

THIS DEED OF TRUST is made between the Trustor, Trustee and Beneficiary named above. Trustor irrevocably grants and conveys to Trustee in trust, with power of sale, the above-described real property and all buildings, improvements and fixtures located thereon or hereinafter erected thereon, together with the leases, rents, issues, profits, or income thereof, (all of which are hereinafter called "property income"); SUBJECT, HOWEVER, to the right, power and authority hereinafter given to and conferred upon Beneficiary to collect and apply such

property income; AND SUBJECT TO covenants, conditions, restrictions, rights-of-way, and easement of record.

THIS DEED OF TRUST IS MADE FOR THE PURPOSE OF SECURING: (a) performance of each agreement of Trustor herein contained; (b) payment of the indebtedness evidenced by the promissory note of even date herewith, and any extension or renewal thereof, in the principal sum of Twenty Million and No/100ths Dollars (\$20,000,000.00) executed by Trustor in favor of Beneficiary; and (c) payment of additional sums and interest thereon which may hereafter be owing by Trustor, or its successors or assigns, to Beneficiary, when evidenced by a promissory note(s) or other written instruments reciting that they are secured by this Deed of Trust (collectively, the "Obligations").

TO PROTECT THE SECURITY OF THIS DEED OF TRUST, TRUSTOR AGREES:

1. To keep the Property in good condition and repair, reasonable wear and tear excepted; not to remove or demolish any building thereon without Beneficiary's prior written consent; to complete or restore promptly and in good and workmanlike manner any building which may be constructed, damaged, or destroyed thereon, but only to the extent of any insurance proceeds received by Trustor, and to pay when due all claims for labor performed and materials furnished therefor; to comply with all laws affecting the Property or requiring any alterations or improvements to be made thereon; not to commit or permit waste thereof; not to commit, suffer or permit any act upon the Property in violation of law; and do all other acts which from the character or use of the Property may be reasonably necessary.

2. To insure the Property with responsible insurers for the full insurable value thereof against loss by fire and such other hazards as may be customarily insured against for similar property and to pay all premiums thereon not less than thirty (30) days prior to the expiration date of any coverage. The amount collected under any fire or other insurance policy may be applied by Beneficiary upon any indebtedness secured hereby and in such order as Beneficiary may determine, or at the option of Beneficiary, the entire amount of so collected or any part thereof may be released to Trustor. Such application or release shall not cure or waive any default or notice of Trustee's sale hereunder or invalidate any act done pursuant to such notice.

3. To appear in and defend any action or proceeding purporting to affect the Property, the security hereof or the rights or powers of Beneficiary or Trustee and to pay all costs and expenses of Beneficiary and Trustee, including cost of evidence of title and attorneys' fees in a reasonable sum, in any such action or proceeding in which Beneficiary or Trustee may appear or be named and in any suit brought by Beneficiary to foreclose this Deed of Trust.

4. To pay: before delinquent, all taxes and assessments affecting the Property; when due, all encumbrances, charges and liens, with interest, on the Property or any part thereof which appear to be prior or superior hereto; all costs, fees and expenses of this Trust, including, without limiting the generality of the foregoing, the fees of Trustee for issuance of the Deed of Release and Full Reconveyance and all lawful charges, costs, and expenses in the event of

reinstatement of, following default in, this Deed of Trust or the obligations secured, hereby.

Should Trustor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, without obligation to do so and without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof, may: make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary or Trustee being authorized to enter upon said property for such purposes; appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; pay, purchase, contest or compromise any encumbrance, charge or lien which in the judgment of either appears to be prior or superior hereto; and in exercising any such powers, pay necessary expenses, employ counsel, and pay counsel's reasonable fees.

5. To pay immediately and without demand all sums expended by Beneficiary or Trustee pursuant to the provisions hereof, together with interest from the date of expenditure at the Default Rate as provided for in the note secured by this Deed of Trust. Any amounts so paid by Beneficiary or Trustee shall become part of the debt secured by this Deed of Trust and a lien on the Property or shall become immediately due and payable at option of Beneficiary or Trustee.

IT IS MUTUALLY AGREED:

6. That any award of damages in connection with any condemnation, or any such taking, or for injury to the Property by reason of public use or for damages for private trespass or injury thereto, is assigned and shall be paid to Beneficiary as further security for all obligations secured hereby (reserving unto the Trustor, however, the right to sue therefor and for the ownership thereof subject to this Deed of Trust), and, upon receipt of such moneys, Beneficiary may hold the same as such further security or apply or release the same in the same manner and with the same effect as above-provided for disposition of proceeds of fire or other insurance.

7. That time is of the essence of this Deed of Trust, and that by accepting payment of any sum secured hereby after its due date, Beneficiary does not waive his right either to require prompt payment when due of all other sums so secured or to declare default for failure so to pay.

8. That at any time or from time to time, and without notice, upon written request of Beneficiary and presentation of this Deed of Trust and said note(s) for endorsement, without liability therefor, without affecting the personal liability of any person for payment of the indebtedness secured hereby, without affecting the security hereof for the full amount secured hereby on all property remaining subject hereto and without the necessity that any sum representing the value or any portion thereof of the property affected by the Trustee's action be credited on the indebtedness, the Trustee may: (a) release and reconvey all or any part of the Property; (b) consent to the making and recording, or either, of any map or plat of the Property or any part thereof; (c) join in granting any easement thereon; and (d) join in or consent to any extension agreement or any agreement subordinating the lien, encumbrance or charge hereof.

9. That upon written request of Beneficiary stating that all sums secured hereby have

been paid, and upon surrender of this Deed of Trust and said note(s) to Trustee for cancellation, and upon payment of its fees, Trustee shall release and reconvey, without covenant or warranty, express or implied, the Property then held hereunder. The recitals in such reconveyance of any matters or facts shall be conclusive proof of the truthfulness thereof. The grantee in such reconveyance may be described as "the person or persons legally entitled thereto.

10. This Deed of Trust shall cover all personal property affixed or located upon the Property which, to the fullest extent permitted by law, shall be deemed fixtures and a part of the Property. Such personal property shall include: (i) all presently owned and hereafter acquired goods, fixtures, furniture, furnishings, machinery, equipment and appliances and all personal property of Trustor now or hereafter attached to or installed or placed in, on or about the Property of use in conjunction with the use and occupancy thereof, together with all accessories, parts and appurtenances thereto and all additions, renewals, improvements, and replacements thereof. Trustor also hereby assigns to Beneficiary all leases and use agreements of all personal property in the categories above set forth, under which Trustor is the lessee or entitled to use such items, which Trustor agrees to execute to Beneficiary separate assignments of such leases and agreements when requested by Beneficiary; but Beneficiary shall not be obligated thereunder unless it so chooses, and Trustor agrees to fully and timely perform such obligations; (ii) all income, rents, issues, and profits which, from and after the date hereof, may accrue from said goods, fixtures, furnishings, machinery, equipment and appliances, or any part thereof, or which may be received or receivable by Trustor from any use, leasing, or subleasing thereof; provided, that so long as Trustor is not in default hereunder, Trustor shall have a license to collect, said income, rents, issues and profits; subject, however, to any Absolute Assignment of Leases and Rentals executed by Trustor to Beneficiary; (iii) all presently owned and hereafter acquired general intangibles and rights of every kind and nature of Trustor relating to the Property or the operation thereof, including but not limited to all governmental permits relating to construction on the Property, all names by which the Property may be operated or known, all rights to carry on business under any such names, and all trade names, trademarks and goodwill in any way relating to the Property; (iv) all presently owned and hereafter acquired reserves, deferred payments, deposits, refunds, and payments, of every kind and nature of Trustor in any way relating to the Property or any of the personal property hereunder other than rents, issues and profits; (v) all presently owned and hereafter acquired water stock owned by Trustor relating to the Property; and, (vi) all presently owned and hereafter acquired drawings, plans and specifications of Trustor prepared for construction of improvements relating to the Property, and all studies, and data related thereto; and all contracts and agreements of the Trustor relating thereto or to the construction of improvements on the Property.

11. That as additional security, Trustor hereby gives to and confers upon Beneficiary the right, power and authority, during the continuance of this Trust, to collect the Property income, reserving to Trustor the right, prior to any default by Trustor in payment of any indebtedness secured hereby or in performance of any agreement hereunder, to collect and retain such property income as it becomes due and payable. Upon any such default beyond any applicable notice or cure period, Beneficiary may at any time, without notice, either in person, by agent or by a receiver to be appointed by a court, and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of the Property or

any part thereof, sue for or otherwise collect such Property income in his own name, including that past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorneys' fees, upon any indebtedness secured hereby and in such order as Beneficiary may determine. The entering upon and taking possession of the Property, the collection of such Property income and the application thereof as aforesaid, shall not cure or waive any default or notice of Trustee's sale hereunder or invalidate any act done pursuant to such notice.

12. That upon default by Trustor beyond any applicable notice or cure period in the payment of any indebtedness secured hereby or in performance of any agreement hereunder, Beneficiary may declare all sums secured hereby immediately due and payable by delivery to Trustee and Trustor of written notice thereof, setting forth the nature thereof, and of election to cause the Property to be sold under this Deed of Trust. Beneficiary also shall deposit with Trustee this Deed of Trust, said note(s) and all documents evidencing expenditures secured hereby.

Trustee shall record and give notice of Trustee's sale and shall sell the property at public auction, all in the manner required by law. Any persons, including Trustor, Trustee or Beneficiary, may purchase at such sale. Trustee shall deliver to such purchaser its Deed conveying the property so sold, but without any covenant or warranty, express or implied. Trustor requests that a copy of any notice of Trustee's sale hereunder be mailed to Trustor at his address hereintofore set forth.

After default or breach, if any sale, proceeding or suit is commenced, Trustor promises to pay Beneficiary's and Trustee's actual attorney's fees, Trustee's fees and its costs and expenses in connection with such proceedings, and if suit is brought, all costs of suit. In addition, Trustor shall pay a reasonable fee for title searches made in preparation for and in the conduct of any such proceedings or suit. All of the foregoing fees and expenses shall be secured by this Deed of Trust.

In the event of sale, the Property may be sold, at the option of Beneficiary or Trustee, in whole or in separate parcels, and Beneficiary or Trustee may bid and become the purchaser at any such sale. Trustee shall deliver to such purchaser its deed conveying the Property so sold, but without any covenant or warranty, express or implied. The recitals in such deed of any matters or facts shall be conclusive proof of the truthfulness thereof. The proceeds of the sale shall be applied as provided by law. The purchaser at the Trustee's Sale shall be entitled to immediate possession of the Property. Title to all insurance policies and all proceeds thereof shall vest in and become the property of the purchaser at any such sale unless Beneficiary shall direct otherwise.

During the term of this Deed of Trust, Trustor intends to execute lease and license agreements (the "Agreements") for uses on the Property that are consistent with the Special Warranty Deed of even date, by which Beneficiary conveyed title to the Property to Trustor (the "Deed") and with the Development Agreement as defined in the Deed. Beneficiary agrees to execute promptly, commercially reasonable nondisturbance and attornment agreements ("NDRA's"), in form and content acceptable to Beneficiary, for such Agreements presented to

Beneficiary by Trustor that implement and promote the goals and objectives of the Development Agreement, provided, however, that Trustor shall have no obligation to execute an NDRA with respect to any Agreement that (i) is not currently in effect, (ii) is in default, (iii) is not for a then-current "market" rate or otherwise includes terms that are not arms'-length, (iv) is for a term, or includes provisions for extensions or renewals, longer than those existing for or included in comparable lease and/or license agreements, or (v) is to Trustor or an affiliate or principal of Trustor, or to Developer (as defined in the Development Agreement) or an affiliate or principal of Developer.

After deducting all costs, fees and expenses of Trustee and of this Trust, including cost of evidence of title in connection with sale and reasonable attorney's fees, Trustee shall apply the proceeds of sale in the manner provided by law. To the extent permitted by law, an action may be maintained by Beneficiary to recover a deficiency judgment for any balance due hereunder.

In lieu of sale, pursuant to the power of sale conferred hereby, this Deed of Trust may be foreclosed in the same manner provided by law for the foreclosure of mortgages on real property. Beneficiary shall also have all other rights and remedies available to it hereunder and at law or in equity. All rights and remedies shall be cumulative.

13. That Trustee may resign by mailing or delivering notice thereof to Beneficiary and Trustor. Beneficiary may appoint a successor Trustee in the manner prescribed by law. A successor Trustee herein shall, without conveyance from the predecessor Trustee, succeed to all the predecessor's title, estate, rights, powers and duties.

14. The term Beneficiary shall mean the owner and holder of the note(s) secured hereby, whether or not named as Beneficiary herein. In this Deed of Trust, whenever the context so requires, the masculine gender includes the feminine and neuter, and the singular number includes the plural.

15. That Trustee accepts this Trust when this Deed of Trust, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party hereto of a pending sale under any other Deed of Trust or of any action or proceeding in which Trustor, Beneficiary or Trustee shall be a party unless brought by Trustee.

16. That the trust relationship created by this Deed of Trust is limited solely to the creation and enforcement of a security interest in real property. All of Trustee's duties, whether fiduciary or otherwise, are strictly limited to those duties imposed by this instrument and A.R.S. §33-801 et. seq., inclusive, and no additional duties, burdens or responsibilities are or shall be placed on Trustee.

17. That this Deed of Trust applies to, inures to the benefit of and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns.

18. All remedies of Beneficiary may be exercised concurrently or consecutively or in proceedings whether legal or equitable, and no failure of Beneficiary to exercise any rights

hereunder and no delay by Beneficiary or Trustee in the exercise of such rights shall be a waiver thereof.

19. It is understood and agreed by the parties hereto that the Trustor shall not assign or otherwise transfer any right, title or interest in or to the Property or this encumbrance during the life of this encumbrance, without the prior written consent of the Beneficiary to such assignment or transfer, which may be granted or withheld by Beneficiary in its reasonable commercial discretion. In the event of such assignment or transfer without prior written consent of the Beneficiary, all indebtedness secured by this encumbrance shall, at the option of the Beneficiary, become all due and payable

20. Severability; Enforceability.

(a) Each covenant, provision and condition of this Deed of Trust shall be interpreted so as to be valid and effective under applicable law. If any such covenant, provision or condition is held to be void or invalid, the same shall not affect the remainder hereof, which shall be valid and effective as though the void or invalid covenant, provision or condition had not been contained herein.

(b) Should this instrument be or ever become ineffective as a deed of trust, then it shall be construed and enforceable as a realty mortgage (with Trustor as the mortgagor and Beneficiary as the mortgagee).

(c) If the lien of this instrument is invalid or unenforceable (either as a deed of trust or as a realty mortgage) as to any part of the Obligations, or if the lien is invalid or unenforceable as to any portion of the Property, the unsecured or partially secured portion of the Obligations shall be completely paid prior to the payment of the remaining secured or partially secured portion of the Obligations. All payments made on the Obligations, whether voluntary or pursuant to foreclosure or some other enforcement action or procedure taken hereunder, shall be considered to have been first applied to the full payment of that portion of the Obligations which is not secured or fully secured by the lien of this instrument.

21. Environmental Inspection Easement; Toxic Waste and Hazardous Substances; Indemnity.

(a) Trustor hereby grants and conveys to Beneficiary and Beneficiary's agents an easement to enter upon the Property at any time and from time to time, subject to the rights of, and taking reasonable precautions to avoid undue interference with the operations of, tenants in possession of portions of the Property, for the purpose of making such audits, tests, inspections and examinations, including subsurface exploration and testing, as Beneficiary in its sole and exclusive discretion considers to be necessary, convenient or proper to determine whether the ownership, use and operation of the Property and the conduct of the activities engaged in thereon are in compliance with federal, state and local environmental laws, rules and regulations. This easement shall exist and continue until the entire Obligations have been repaid in full. A release of this Deed of Trust shall evidence a termination of the easement granted herein. This easement is coupled with an interest and may not be revoked by Trustor or its successors or assigns (except for Beneficiary and Beneficiary's successors and assigns). Trustor

(b) Trustor shall indemnify, defend, pay and hold harmless Beneficiary and its successors and assigns for, from and against any and all claims, liabilities, proceedings, suits, losses, damages (including punitive damages), judgments and environmental response and clean up costs, fines, penalties and expenses (including reasonable attorney fees, costs and expenses incurred in investigating and defending against the assertion of any such liabilities, regardless of their merit), which may be asserted against, sustained, suffered or incurred by Beneficiary or its successors and assigns because of the existence of any such toxic or hazardous material, substance, waste, pollutant or contaminant or arising from any other violation of any governmental law, regulation or requirement now or hereafter in effect relating to human health or the safety or protection of the environment except to the extent caused by acts or omissions first occurring after Trustor has been dispossessed of the Property by Beneficiary by reason of foreclosure or otherwise. This indemnity shall include claims asserted by any federal, state or local governmental agency or any private party and shall continue in effect following any release and reconveyance of this Deed of Trust or foreclosure or other realization upon the security by Beneficiary or its successors and assigns, or any conveyance in lieu of such foreclosure or other realization

This instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2000, by Richard Mladick and Jerry Hug, the Managers of WAVEYARD DEVELOPMENT, LLC, a

Delaware limited liability company, on behalf of the company.

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Notary Public

My commission expires:

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## EXHIBIT D ACCESS AGREEMENT

THIS ACCESS AGREEMENT ("Agreement") is made as of \_\_\_\_\_, 2007 by and between CITY OF MESA, an Arizona municipal corporation ("Seller"), and WAVEYARD DEVELOPMENT, LLC, a Delaware limited liability company ("Licensee").

### RECITALS

A. Seller and Licensee are parties to the Purchase Agreement and Escrow Instructions dated as of June \_\_\_, 2007 (the "Purchase Agreement") for sale by Seller to Licensee of certain real property located in Maricopa County, Arizona, more particularly described on Exhibit "A" to the Purchase Agreement, which is hereby incorporated herein (the "Property").

B. Licensee desires to enter onto the Property for the purpose of conducting various inspections of the Property as described herein.

NOW, THEREFORE, the parties hereto agree as follows:

1. License to Enter Property. Seller hereby grants Licensee and its duly authorized agents, consultants and independent contractors (collectively, "Representatives") a nonexclusive license to enter upon the Property, at Licensee's sole cost and expense, for the purpose of conducting a Phase I soils analysis of the Property as well as any other non-intrusive tests, studies and surveys relating to the Property; provided, each of Licensee's or its Representatives' entries onto the Property shall only be made (a) with at least three (3) business day's prior written request sent by facsimile to Seller, attn: City Manager; (b) in the presence of representatives of Seller, if required by Seller; (c) in accordance with any reasonable day and time limitations imposed by Seller, and (d) in such a manner so as to not to interfere with the use of the Property by Seller. Notwithstanding anything to the contrary contained herein, Buyer shall not have the right to conduct any ground penetration, drilling, excavation or physical sampling activities whatsoever except as approved in writing by Seller, which may be given or withheld in Seller's sole discretion. Seller may condition its approval on Licensee obtaining additional insurance coverage in an amount that corresponds with the liability risk associated with the requested activity. Neither Licensee nor any of its Representatives may place any structure, sign or other improvement on the Property without Seller's prior written consent, which may be given or withheld in the exercise of Seller's sole discretion.

2. Government Regulations. While on the Property, Licensee and its Representatives shall comply with all applicable governmental laws and regulations.

3. Liens. Licensee shall not suffer or permit to be enforced against the Property any mechanics', materialmen's, contractors' or subcontractors' liens or any claim for damage arising from the investigations performed by Licensee or its Representatives and Licensee shall pay or

cause to be paid all of said liens, claims or demands before any action is brought to enforce the same against the Property.

4. Indemnity. Licensee shall indemnify, defend (by counsel reasonably satisfactory to Seller) and hold Seller and its divisions, subsidiaries, partners and affiliated members, companies and its and their employees, officers, shareholders, directors, agents, representatives, and professional consultants and its and their respective successors and assigns (collectively, the "Indemnitees") harmless for, from and against any loss, damage, injury, accident, fire or other casualty, liability, claim, cost or expense (including but not limited to, reasonable attorneys' fees) of any kind or character to any person or property, including the property of the Indemnitees (collectively, the "Claims") arising from or relating to Licensee's entry onto the Property, including without limitation (a) any use of the Property by Licensee or its Representatives, (b) any act or omission of Licensee or any of its Representatives, (c) any bodily injury, property damage, accident, fire or other casualty to or involving Licensee or its Representatives and its or their property on the Property, (d) any violation or alleged violation by Licensee or its Representatives of any law or regulation now or hereafter enacted relating to the Property, (e) any loss or theft whatsoever of any property or anything placed or stored by Licensee or its Representatives on or about the Property, (f) any breach by Licensee of its obligations or rights under this Agreement, and (g) any enforcement by Seller of any provision of this Agreement and any cost of removing Licensee from the Property; provided, however, the foregoing indemnity shall not apply to the extent any such Claim is ultimately established by a court of competent jurisdiction to have been caused by the acts or omission of any of the Indemnitees. Notwithstanding anything to the contrary contained herein, the terms and conditions of this Section 4 shall survive the termination of this Agreement, the close of escrow on the Property or the termination or cancellation of the Purchase Agreement.

5. Insurance. Licensee at its sole cost and expense shall maintain comprehensive general liability insurance ("Liability Insurance") on an "occurrence basis" against claims for "personal injury," including without limitation, bodily injury, death or property damage, occurring upon, on or about the Property, such insurance to afford immediate minimum protection, at the time of the inception of this Agreement, and at all times during the term of this Agreement, to a limit of not less than One Million and No/100 Dollars (\$1,000,000.00) with respect to personal injury or death to any one or more persons or for damage to property. Such insurance shall designate, and be for the benefit of, Licensee, as the named insured party and Seller, as an additional insured on the policy as evidenced by additional insured endorsements. The limits of said insurance shall not, however, limit the liability of Licensee hereunder. No such policy shall be cancelable or subject to reduction of coverage or other modification except after thirty (30) days written notice to Seller.

6. Payment of Claims. In addition to and not in limitation of Seller's other rights and remedies under this Agreement, should Licensee fail within ten (10) business days after written request from Seller to either (a) pay and discharge any lien or claim arising out of Licensee's or its Representatives' use of the Property, or (b) indemnify and defend the Indemnities from and against any Claim as provided herein, then in any such case Seller may, at its option, pay any such lien or claim or settle or discharge any action therefore or satisfy any judgment thereon, and

all costs, expenses and other sums incurred by Seller in connection therewith (including but not limited to reasonable attorneys' fees) shall be paid to Seller by Licensee upon written demand together with interest thereon at the rate of ten percent (10%) per annum, from the date incurred or paid until repaid.

7. Termination. Licensee's rights granted by this Agreement shall terminate automatically without notice, except where otherwise indicated, upon the earlier to occur of (a) the termination of the Purchase Agreement for any reason whatsoever, or (b) the date Licensee is or becomes bankrupt or insolvent, makes an assignment for the benefit of creditors, or institutes a proceeding under the Bankruptcy Act in which case Licensee is the bankrupt party.

8. Nature of Licensee's Rights. Licensee acknowledges (a) this Agreement grants Licensee a revocable nonexclusive license, and (b) Licensee has no rights as an owner, purchaser or tenant by virtue hereof. Upon termination of this Agreement, Licensee shall promptly vacate the Property.

9. Maintenance and Condition of Property. Licensee will be responsible for any damage done to the Property by Licensee or its Representatives and, upon departing from or being required to vacate the Property, will pay the costs of repairing and restoring the Property and every portion thereof, if caused by Licensee or its Representatives, to at least as good a condition as existed prior to Licensee's entry onto the Property.

10. Assignability. This Agreement may not be assigned, whether voluntarily or by operation of law and Licensee shall not permit the use of the Property, or any part thereof, except in strict compliance with the provisions hereof, and any attempt to do so shall be null and void; provided, however, Licensee may assign this Agreement to any permitted assignee of Licensee's rights as Buyer under the Purchase Agreement if the assignee agrees, in writing, to fully assume the obligations of Licensee under this Agreement and to otherwise abide by the terms and provisions of this Agreement.

11. Attorneys' Fees. If any action is brought by either party in respect to its rights under this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees and court costs as determined by the court.

12. Binding Effect. Except as limited by the provisions of Section 10, the provisions of this Agreement are binding upon and shall inure to the benefit of the parties and their respective heirs, personal representatives, successors and assigns.

13. Applicable Law. This Agreement shall be construed according to Arizona law.

14. Notices. Notices shall be in writing and shall be given by personal or air courier service delivery to a responsible person, by facsimile, or by deposit in the United States mail, certified mail, return receipt requested, postage prepaid. Notices shall be delivered or addressed to Seller and Licensee at the addresses set forth below or at such other address as a party may designate in writing. The date notice is deemed to have been given, received and become effective shall be

the date on which the notice is delivered, if notice is given by personal or air courier service delivery or by facsimile, or the date of actual receipt if the notice is sent through the United States mail.

To "Seller": CITY OF MESA  
Douglas Tessendorf  
Post Office Box 1466  
Mesa, Arizona 85211-1466  
Telephone: 480-644-2520  
Facsimile: 480-644-3465  
Email: douglas.tessendorf@cityofmesa.org

To "Seller": CITY OF MESA  
Andrea Moore  
Post Office Box 1466  
Mesa, Arizona 85211-1466  
Telephone: 480-644-2643  
Facsimile: 480-644-5320  
Email: andrea.moore@cityofmesa.org

To "Licensee": \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_  
Telephone: \_\_\_\_\_  
Facsimile No.: \_\_\_\_\_  
Email: \_\_\_\_\_

15. Entire Agreement. This Agreement constitutes the entire agreement between the parties pertaining to the subject matter contained herein. All prior and contemporaneous agreements, representations and understandings of the parties, oral or written, are superseded by and merged in this Agreement. No supplement, modification or amendment of this Agreement shall be binding unless in writing and executed by Seller and Licensee.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

**SELLER:**

**CITY OF MESA**, an Arizona municipal corporation

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Pursuant to Resolution of the Mayor and Council adopted \_\_\_\_\_, 2007.

**LICENSEE:**

**WAVEYARD DEVELOPMENT, LLC**, a Delaware limited liability company

By: \_\_\_\_\_

Jerry Hug, Manager

By: \_\_\_\_\_

Richard Mladick, Manager

**EXHIBIT E**  
**SPECIAL WARRANTY DEED**

When Recorded, Mail to:

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**SPECIAL WARRANTY DEED**  
**AND PROPERTY RESTRICTIONS WITH RIGHT OF REVERTER**

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For the consideration of the sum of Ten Dollars (\$10.00) and other valuable consideration received, the CITY OF MESA, an Arizona municipal corporation ("**Grantor**"), does hereby convey to WAVEYARD DEVELOPMENT, LLC, a Delaware limited liability company ("**Grantee**"), all of Grantor's right, title and interest in and to the following described real property (the "**Property**") situated in Maricopa County, Arizona, together with all improvements thereon and all of Grantor's interest in any rights and privileges appurtenant thereto:

SEE EXHIBIT "A" ATTACHED HERETO AND BY THIS  
REFERENCE MADE A PART HEREOF

SUBJECT TO all matters of record and to any and all conditions, easements, encroachments, rights-of-way, or restrictions which a physical inspection, or accurate ALTA survey, of the Property would reveal; all previously reserved oil, gas and mineral rights and deposits and appurtenant rights in favor of the United States of America; and all applicable municipal, county, state or federal zoning and use regulations.

AND FURTHER SUBJECT TO the following terms, covenants, conditions, restrictions and rights of reversion (the "Covenants and Reverter"):

1. Covenants Regarding Use of Property. The Property shall be developed and used only as follows:

(A) As to that portion of the Property identified in the Development Master Plan (as defined below) as the "Outdoor Attractions," that portion of the Property shall be developed and used only as a water entertainment project (of the manner that Grantee intends to develop as "Waveyard"), and as further described as the "Minimum Entertainment Improvements" in that certain Development Agreement dated June \_\_, 2007, between Grantor and Grantee, and recorded in the Official Records of Maricopa County as No. \_\_\_\_\_ (the "Development Agreement"); and

(B) As to the balance of the Property, that balance of the Property shall be developed and used only as a destination resort and hospitality facility and related improvements as described in, and of the quality described in, the Development Agreement and those uses in the project description for the "Development Master Plan" (so-called) approved by the City Council of the City of Mesa, Arizona, in Zoning Case Z07-35.

(C) The use and development of the Property as described in Sections 1(A) and 1(B) above are further subject to certain "Prohibited Uses" as defined and set forth in the Development Agreement.

(D) The restrictions described in this Section 1, including all of its subparts, may be referred to collectively in this Deed as the "Covenants." Grantee agrees and acknowledges that the restricted use of the Property as described in the Covenants has been bargained for with Grantor, and constitutes a material portion of the consideration for the conveyance of the Property from Grantor to Grantee.

2. Reverter. Grantee and its successors and assigns shall at all times comply and abide with any and all of the Covenants set forth in this Deed, including all subparts thereof. If Grantee or any successor or assign of Grantee should fail at any time or times to comply and abide with, or to continue to comply and abide with, any such Covenant, Grantee, or its successors or assigns, as the case may be, shall have a period of sixty successive calendar days commencing upon and immediately following the date of delivery of a written notice from Grantor (or its successors and assigns) identifying such failure (the "Default Notice"), during which sixty day period of time (i) such failure must cease or be cured to the fullest extent objectively possible, or (ii) the cessation or cure of such failure must have been commenced in good faith and be in the process of being diligently pursued to completion, in which case the cessation or cure of said failure must occur to the fullest extent objectively possible no later than one hundred and eighty consecutive calendar days immediately following the delivery of the Default Notice. By acceptance of this Deed, Grantee acknowledges and agrees that the breach of any of the foregoing Covenants not cured in accordance with the provisions of this Section 2, shall cause title to, full ownership of and all rights and benefits to the Property automatically to revert to Grantor or its successors and assigns (the "Reversionary Owner") upon the recordation by Reversionary Owner of a notice in the Official Records of Maricopa County, Arizona, of Reversionary owner's intent to cause the reversion of the Property, which notice shall refer specifically to this Section 2. Promptly following the recordation by Reversionary Owner of the notice described in the immediately preceding sentence and payment by Reversionary Owner to Grantee (the "Payment") of all principal amounts paid by Grantee to Grantor for the Property (but not including interest or the unpaid portion of any promissory note given by Grantee in connection with its purchase of the Property, and in no event more than \$30,000,000.00), the Reversionary Owner shall have the right of immediate re-entry on and exclusive possession of the entire Property and Grantee (and its successors and assigns) shall have no further interest in or to any portion of the Property. In addition, the Covenants set forth above shall be covenants running with the land and the breach of any of them, or the continuance of any breach which is not cured as set forth above, may be enjoined or remedied by appropriate proceedings by the Reversionary Owner, but by no other person. Notwithstanding the foregoing, the Payment shall

be reduced by the sum of Fifty Thousand and no/100 Dollars (\$50,000.00), as an administrative, handling and legal fee to Grantor in connection with exercising its rights under the Reverter, which Grantor and Grantee agree and acknowledge is a fair and reasonable estimation of Grantor's fees, costs and expenses, constitutes a liquidated amount in view of the difficulty of ascertaining the actual amount of such fees, costs and expenses, and is not a penalty.

3. Duration. The Covenants and Reverter shall apply and continue to apply to the Property at all times hereafter for a period of fifty (50) years from the date of recordation of this Deed, and at the expiration of such term shall be deemed automatically, and without further act or instrument required, extinguished and released.

A. Notwithstanding the foregoing, if (i) Grantee has undertaken Commencement of Construction (as defined in the Development Agreement) of the Minimum Entertainment Improvements (as defined in the Development Agreement) and (ii) Grantor's City Manager has determined, in his or her sole and absolute discretion that Grantee has the financial ability (through demonstrated financial worth, existence of binding loan commitments, equity contribution[s] to insure the construction of the Minimum Entertainment Improvements, bonds, and/or other mechanisms) to accomplish timely Completion of Construction (as defined in the Development Agreement) of the Minimum Improvements, then Grantor shall, upon written request by Grantee, record a release of the Reverter, after which time the Reverter shall no longer apply to the Property. Notwithstanding the release of the Reverter, the Covenants shall continue to apply to the Property for the term specified in this Section 3.

B. Notwithstanding the foregoing, if (i) Grantee has timely achieved Completion of Construction (as defined in the Development Agreement) of the Minimum Entertainment Improvements and the Minimum Resort Improvements (as defined in the Development Agreement) and (ii) immediately thereafter opens to the public and continuously operates the Minimum Entertainment Improvements and the Minimum Resort Improvements for a period of three (3) calendar years, then Grantor shall, upon written request by Grantee, record a release of the Covenants, after which time the Covenants shall no longer apply to the Property; provided, however, that notwithstanding the release of the Covenants described in Section 1(A) and Section 1(B) of this Deed, the Prohibited Uses described in Section 1(C) shall continue to apply to the Property and be enforceable for the Term (as defined therein) of the Development Agreement.

4. Enforcement. In addition to the remedies set forth above, all remedies at law and in equity shall be available to Grantor in enforcing the Covenants and Reverter; and Grantor may bring, but is not limited to, an action to obtain specific performance and/or injunctive relief to compel compliance with the terms of the Covenants and Reverter. The election of one remedy shall not exclude the election of another. No waiver or estoppel shall be created or be deemed to exist by the failure to take enforcement action for a violation of these terms.

5. Waiver. No delay or omission on the part of Reversionary Owner in exercising any right, power or remedy provided in this Deed in the event of the breach of the covenants, conditions and restrictions herein shall be construed as a waiver thereof or acquiescence therein

or thereto, and no right of action shall accrue in favor of, nor shall any action be brought or maintained by, anyone whomsoever against the Reversionary Owner for or on account of the Reversionary Owner's failure to bring any action on account of any breach of the covenants, conditions and restrictions contained in this Deed, or for imposing covenants, conditions and restrictions in this deed which may be unenforceable by the Reversionary Owner.

6. Severability. In the event any one or more of the foregoing provisions or covenants, conditions and restrictions is declared for any reason, by a court of competent jurisdiction, to be null and void, the judgment or decree shall not in any manner whatsoever, effect, modify, change, abrogate or nullify any of the covenants, conditions, reservations, restrictions not declared to be void or unenforceable, but all of the remaining covenants, conditions, reservations and restrictions not expressly held to be void or unenforceable shall continue unimpaired and in full force and effect.

7. Notices. Wherever in this deed it shall be required or permitted that notice or demand be given or served by either Grantor or Grantee to or on the other, such notice or demand shall be given or served, and shall not be deemed to have been duly given or served unless in writing and forwarded by (i) certified or registered mail, return receipt requested and postage prepaid, or (ii) by personal delivery (which may include public or private express delivery and overnight courier services) addressed to Grantor or Grantee as follows:

If to Grantor:

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If to Grantee:

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Either Grantor or Grantee may change such address by written notice in the manner specified above for the giving of notices to the other. Notice shall be deemed delivered and received three (3) business days following deposit with the United States Postal Service if forwarded by certified or registered mail in accordance with the provisions of Section 7(i) above, or upon personal delivery if delivered by personal delivery in accordance with Section 7(ii) above.

AND GRANTOR hereby binds itself and its successors to warrant and defend the title against all of the acts of Grantor and no other, subject to the matters set forth above.

IN WITNESS WHEREOF, Grantor has caused this Special Warranty Deed to be executed as of this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, and Grantee has accepted the Covenants and Reverter by executing this Special Warranty Deed to be effective as of the same date.

GRANTOR:

CITY OF MESA, an Arizona municipal  
corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

GRANTEE:

WAVEYARD DEVELOPMENT, LLC, a  
Delaware limited liability company

By: \_\_\_\_\_  
Richard Mladick, Manager

By: \_\_\_\_\_  
Jerry Hug, Manager

STATE OF ARIZONA       )  
  ) ss.  
County of Maricopa       )

On this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me, the undersigned Notary Public, personally appeared \_\_\_\_\_, who acknowledged him/herself to be the \_\_\_\_\_ of the CITY OF MESA, an Arizona municipal corporation and that, being authorized so to do, he/she executed the foregoing instrument for the purposes herein contained on behalf of the Grantor.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

\_\_\_\_\_  
Notary Public

(Seal)

STATE OF ARIZONA       )  
  ) ss.  
County of Maricopa       )

On this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me, the undersigned Notary Public, personally appeared Richard Mladick and Jerry Hug, who acknowledged themselves to be the managers of WAVEYARD DEVELOPMENT, LLC, a Delaware limited liability company, and that, being authorized so to do, they executed the foregoing instrument for the purposes herein contained on behalf of the Grantee.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

\_\_\_\_\_  
Notary Public

(Seal)

**EXHIBIT "A" TO SPECIAL WARRANTY DEED**

**LEGAL DESCRIPTION OF PROPERTY**

## **EXHIBIT E PROHIBITED USES**

Notwithstanding the provisions of the City's Zoning Ordinance and any other City codes, ordinances, and statutes, the following uses, regardless of whether defined in the City's Zoning Ordinance, are prohibited within the property (the "Prohibited Uses"):

- adult care home
- assisted living facility
- auto dealership
- automobile service station
- automobile wrecking
- auto paint and body repair
- "big box" (as defined in the City's General Plan) retailers
- boarding house
- body piercing salon
- car rental agency and/or satellite facilities with ancillary outdoor vehicle storage
- car wash
- cemetery
- commercial printing facilities
- crematories
- day care group home
- drive in restaurant
- drive through facility
- fabrication of sheet metal, sign and cabinet shop
- factory built buildings maintained in excess of thirty (30) days
- farmer market
- foster home
- fraternal organizations, service clubs
- general auto repair and upholstery
- gravel pit
- group foster home
- group home for the handicapped
- hospital
- indoor storage for wholesale distribution accessory to retail business
- industrial trade school
- junkyard
- landfill
- machine shop
- mortuaries
- outdoor display areas of manufactured homes, utility trailers, plant nurseries, building materials
- pawn shop
- pool hall
- portable storage containers maintained in excess of thirty (30) days
- recovery home

sexually oriented businesses  
small animal hospital or clinic  
social service facility  
storage buildings with individually rented storage rooms  
supervised living facility  
swap meet  
towing or impound yard  
tattoo parlors  
unscreened outdoor storage  
vocational school  
waste transfer station

The City's Zoning Administrator shall determine whether a proposed use is a Prohibited Use, and such decision shall be final and not subject to appeal. Notwithstanding the foregoing, Developer shall be permitted to maintain a plant nursery that is solely appurtenant to the Project and solely provides plants for the Project, and a reasonable number of suitably screened storage buildings (that comply with all Applicable Laws) that are solely appurtenant to the Project and provide storage for supplies and equipment used in connection with the Project. Factory-built buildings and portable storage containers are permitted for no longer than thirty (30) days upon delivery of a notice of intent to the City's Planning Department. A "Big Box" retailer may be permitted solely upon the discretion of the City Manager if (i) such use is then permitted by the Rules and (ii) the City Manager determines, in his or her sole and absolute discretion, that the proposed user is a unique or specialty retailer that is of significant value to the City.

**EXHIBIT F**  
**CITY OF MESA INSURANCE REQUIREMENTS**

A. Property. The Developer if acting as general contractor, or the general contractor if not the Developer, shall provide builder's risk insurance, with the City as an additional insured, on an all-risk, replacement cost basis for the Public Improvements.

B. Liability. The Developer if acting as general contractor, or the general contractor if not the Developer, shall provide insurance covering the Developer and (as an additional insured) the City against liability imposed by law or assumed in any written contract, and/or arising from personal injury, bodily injury or property damage, with a limit of liability of \$2,000,000.00 per occurrence with a \$2,000,000.00 products/completed operations limit and a \$5,000,000.00 general aggregate limit. Such policy must be primary and written to provide blanket contractual liability, broad form property damage, premises liability and products and completed operations.

C. Contractor. During the period of any construction involving the Public Improvements, each of the general or other contractors with which the Developer contracts for any such construction shall be required to carry liability insurance of the type and providing the minimum limits set forth below:

i) Workman's Compensation insurance and Employer's Liability with limits of \$1,000,000.00 per accident, \$1,000,000.00 per disease and \$1,000,000.00 policy limit disease.

ii) Commercial general liability insurance on a \$2,000,000.00 per occurrence basis providing coverage for:

Products and Completed Operations  
Blanket Contractual Liability  
Personal Injury Liability  
Broad Form Property Damage  
X.C.U.

iii) Business automobile liability including all owned, non-owned and hired autos with a limit of liability of not less than \$1,000,000.00 combined single limit for personal injury, including bodily injury or death, and property damage.

D. Architect. In connection with any construction involving the Public Improvements, the Developer's architect shall be required to provide architect's or engineer's professional liability insurance with a limit of \$1,000,000.00 per claim. This policy, or other policies, shall cover claims for a period of not less than three (3) years after the completion of construction involving the Public Improvements.

E. Engineer. In connection with any construction involving the Public Improvements, the Developer's soils engineer or environmental contractor shall be required to provide engineer's professional liability insurance with a limit of \$1,000,000.00 per claim. This policy, or other policies, shall cover claims for a period of not less than three (3) years after the completion of the construction involving the Public Improvements.

F. Operations. At all times following Completion of Construction, and while Developer (or its successors and assigns) operates the Project and/or conducts its business from the Property (or any part of the Property) and the City maintains a deed of trust or similar security instrument on all or any portion of the Property to secure repayment of any unpaid amounts owing pursuant to the Note and/or the Lease remains in effect, Developer shall maintain commercial general liability insurance in the amounts specified in Section C(ii) above, and subject to the further terms and conditions of Section H below, with the City as an additional insured.

G. CPI Adjustments. The minimum coverage limits set forth above shall be adjusted as of the commencement of any construction involving the Public Improvements, and every five (5) years thereafter during the period of any construction involving the Public Improvements by rounding each limit up to the million dollar amount which is nearest the percentage of change in the Consumer Price Index (the "CPI") determined in accordance with this paragraph. In determining the percentage of change in the CPI for the adjustment of the insurance limits, the CPI for the month of October in the year preceding the adjustment year, as shown in the column for "All Items" in the table entitled "All Urban Consumers" under the "United States City Averages" as published by the Bureau of Labor Statistics of the United States Department of Labor, shall be compared with the corresponding index number for the month of October in the year during which the Effective Date of the Development Agreement of which this Exhibit is a part occurs. However, in no event shall the adjusted, required minimum coverage limits exceed an amount which is reasonable and customary at the time of Commencement of Construction of the Public Improvements, or at the time of any subsequent adjustment, nor shall the minimum coverage limits exceed the then-current requirements of the City generally applicable to other large construction or development projects within the City.

H. Miscellaneous. All policies of insurance shall comply with the requirements of Section 9.4 of the Development Agreement of which this Exhibit is a part and, in addition, shall provide that no such policy may be amended, cancelled, terminated or permitted to expire without at least 30 days advance written notice to the City. References herein to the Agreement shall mean the Development Agreement of which this Exhibit is a part. Capitalized terms not defined in this Exhibit shall have the meanings ascribed to them in the Agreement.

**EXHIBIT G**  
**NON-DISTURBANCE AND RECOGNITION AGREEMENT**

When recorded, return to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

=====

**NON-DISTURBANCE AND RECOGNITION AGREEMENT**

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THIS NON-DISTURBANCE AND RECOGNITION AGREEMENT (this "NDRA") is made as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, by and among: (a) \_\_\_\_\_, a(n) \_\_\_\_\_ ("Developer"); (b) \_\_\_\_\_ ("Lender"); and (c) City of Mesa, Arizona, an Arizona municipal corporation ("City").

1. Recitals.

1.1 Developer is the present developer under a Disposition and Redevelopment Agreement entered into with the City, dated June \_\_\_\_, 2007, and recorded in the Official Records of Maricopa County, Arizona, at \_\_\_\_\_ (the "**Agreement**"), which Agreement sets forth certain rights and responsibilities of Developer with respect to the development of that certain real property referred to in the Agreement (and herein) as the "**Property**," and more particularly described in Exhibit "A" attached hereto.

1.2 Developer's obligations arising under the Agreement include but are not limited to the acquisition and/or development of the Property, and/or the construction of improvements upon the Property, and the construction of certain "**Public Improvements**" as defined in the Agreement in and around the Property (collectively, the "**Obligations**").

1.3 Lender has agreed to lend money to Developer, and Developer will execute certain loan documents (the "**Loan Documents**") including but not limited to a *Deed of Trust, Assignment of Rents, Security Agreement and Financing Statement* for the use and benefit of Lender (the "**Deed of Trust**") and a *Collateral Assignment of Rights under Development Agreement* (the "**Assignment**") to secure the loan from Lender to Developer (the "**Loan**"). The Deed of Trust and the Assignment will be recorded in the Official Records of Maricopa County, Arizona, and will encumber the Property.

1.4 Lender has certain rights under the Loan Documents in the event of a Non-Performance by Developer of its obligations either under the Loan Documents or the Agreement, including but not limited to the right of Lender to be substituted for Developer under the Agreement and to assume Developer's position with respect to the Agreement; and the Agreement states in Section

14.21 thereof that a Lender may be allowed to assume Developer's rights and obligations (collectively, "**Developer's Position**") with respect to the Agreement.

1.5 Accordingly the parties have executed this NDRA to be effective as of the date set forth above.

2. Subordination. Subject only to the specific provisions of (i) Section 3 hereof regarding the right of Lender to assume Developer's Position with respect to the Agreement and (ii) Section 4 hereof regarding non-disturbance and recognition, all rights of Developer and Lender under the Deed of Trust are and shall continue to be junior, inferior, subject and subordinate to the Agreement, as it may hereafter be modified, amended, restated or replaced.

3. Notice of Developer Non-Performance.

3.1 If Lender is a "Designated Lender" as defined in Section 14.21 of the Agreement, City shall give Lender written notice of any Event of Non-Performance by Developer (the "**Notice**") under the Agreement and 30 days following the expiration of Developer's cure period under the Agreement to cure such Event of Non-Performance (as the Agreement exists as of the date of this NDRA), prior to terminating the Agreement or invoking such other remedies as may be available to City under the Agreement.

3.2 Lender shall have the option, following Lender's receipt of the Notice, and within the time period set forth herein for curing an Event of Non-Performance of Developer, in its sole election either: (a) to cure the Event of Non-Performance of Developer, in which event Developer shall retain its position with respect to the Agreement; or (b) in addition to any other remedies available to Lender under law, equity or contract (including but not limited to the Deed of Trust and the Assignment) to assume Developer's Position with respect to the Agreement (to "**Assume**" or an "**Assumption**"). Lender shall give written notice to City of its intention to Assume on or before the expiration of any applicable cure period available to Lender.

3.3 If Lender agrees to Assume Developer's Position with respect to the Agreement, Lender and City shall execute an amendment to the Agreement (an "**Amendment**") and shall cause the Amendment to be recorded in the Official Records of Maricopa County, Arizona. The Amendment shall state that Lender has fully assumed Developer's Position with respect to the Agreement, and that Lender is thereafter substituted for Developer with respect to all Obligations, payment and performance rights and responsibilities arising under or in connection with the Agreement. The execution or approval by Developer of the Amendment shall not be necessary or required, and upon execution and recordation of the Amendment, City shall (i) look to Lender and/or Developer for performance of the Obligations under the Agreement and (ii) make to Lender all payments, and render all performance required to be made by the City, required to be made to Developer under the Agreement.

3.4 In connection with (i) any foreclosure by Lender (whether by notice or judicially) of the Deed of Trust, or any other acquisition by Lender of the Property in lieu of such foreclosure (collectively, a "**Foreclosure**") and (ii) the transfer of the Property to a third-party purchaser or purchasers (by way of illustration and not in limitation, a purchaser or purchasers at a trustee's sale conducted pursuant to A.R.S. §33-810) concurrently with such Foreclosure or thereafter (a

“Purchaser”), the Developer’s Position under the Agreement shall accompany and be deemed covenants running with the Property, and the Purchaser shall be deemed to have assumed Developer’s Position with respect to the Agreement. Upon the acquisition of the Property by a Purchaser, City shall (i) look to Purchaser and/or Developer for performance of the Obligations under the Agreement and (ii) make to Purchaser all payments, and render all performance required to be made by the City, required to be made to Developer under the Agreement.

3.5 Until an Assumption as defined herein, nothing in this NDRA shall constitute an assumption by Lender of any Obligation. Developer shall continue to be liable for all of the Obligations thereunder and shall perform all such Obligations, shall comply with all terms and conditions of the Agreement applicable to Developer, and shall take such steps as may be necessary or appropriate to secure performance by the City under the Agreement.

3.6 Whether before or after an Assumption as defined herein, nothing in this NDRA shall constitute a release of Developer of any Obligation.

4. Nondisturbance and Recognition.

4.1 In the event that City institutes any proceedings to enforce the Agreement, City agrees that, so long as Lender is not in default (beyond any applicable cure period provided to Lender under this NDRA) under the Agreement:

4.1.1 City shall not interfere with or disturb Lender’s rights under the Agreement and this NDRA; and

4.1.2 Lender shall not be made a party to any proceeding commenced pursuant to the Agreement, unless Lender is determined to be a necessary party for purposes of maintaining the action or securing other necessary relief not involving the termination of Lender’s interest under the Deed of Trust or the Assignment, provided that nothing herein shall prevent City from giving any required notice to Lender.

4.2 Upon and following an Assumption, Lender shall recognize the City’s rights under the Agreement for the balance of the Term thereof. The recognition described in this Section 4.2 shall automatically become effective upon an Assumption by Lender.

5. Estoppel

5.1 City and Developer hereby confirm to Lender that as of the date of this NDRA and to the best of their respective actual knowledge:

- a) There is no Event of Non-Performance applicable to either City or Developer under the Agreement;
- b) The Agreement has not been assigned, modified or amended in any way except as set forth in Recital 1.1;
- c) The Agreement is in full force and effect; and

- d) [IF APPROPRIATE] "Completion of Construction", as defined in the Agreement occurred on \_\_\_\_\_.

6. Miscellaneous.

6.1 This NDRA shall be binding upon and inure to the benefit of City, Developer and Lender and their respective successors and assigns, including, without limitation, any successful bidder at any judicial foreclosure or trustee's sale.

6.2 Except as otherwise required by law, any notice required or permitted under this NDRA shall be in writing and shall be given by personal delivery, or by deposit in the United States mail, certified or registered, return receipt requested, postage prepaid, addressed to the parties at their respective addresses set forth below, or at such other address as such party may designate in writing pursuant to the terms of this Section, or by any nationally recognized express or overnight delivery service (e.g., Federal Express or UPS), delivery charges prepaid:

If to City:

City of Mesa

\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_

With required copies to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_

If to Developer:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_

With required copies to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_

If to Lender:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_

With required copies to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_

Any notice sent by United States Postal Service certified or registered mail shall be deemed to be effective the earlier of the actual delivery, or three (3) business days after deposit in a post office operated by the United States Postal Service. Any notice sent by a recognized national overnight delivery service shall be deemed effective one (1) business day after deposit with such service. Any notice personally delivered or delivered through a same-day delivery/courier service shall be deemed effective upon its receipt or refusal to accept receipt by the addressee. Any party may designate a different person or entity or change the place to which any notice shall be given as herein provided, by giving notice to the other parties as provided in this Section 6.2.

6.3 This NDRA is delivered in and relates to property located in Maricopa County, Arizona, and the rights and obligations of the parties hereunder shall be governed by and construed in accordance with the substantive laws and judicial decisions of the State of Arizona (regardless of Arizona conflict of laws principles or the residence, location, domicile or place of business of the parties and their constituent principals) and applicable federal laws, rules and regulations, subject to Section 14.1 of the Agreement.

6.4 This NDRA integrates all of the terms and conditions of the parties' agreement regarding the subordination of the Deed of Trust and Lender's interest thereunder to the Agreement, and supersedes all prior oral or written agreements with respect to such subordination (only to the extent, however, as would affect the priority between the Agreement and the Deed of Trust). This NDRA may not be modified or amended except by a written agreement signed by the parties or their respective successors in interest.

6.5 This NDRA may be executed and acknowledged in one or more counterparts, each of which may be executed by one or more of the signatory parties. Signature and notary pages may be detached from the counterparts and attached to a single copy of this NDRA physically to form one legally effective document.

6.6 This NDRA is subject to, and may be terminated by the City in accordance with, the provisions of A.R.S. §38-511.

6.7 Each party to this NDRA represents and warrants to the others that all necessary company, corporate and/or governmental approvals, consents and authorizations have been obtained prior to the execution of this NDRA by such party, and that the person executing this NDRA on behalf of such party is duly authorized to do so to bind such party.

6.8 Capitalized terms not defined herein shall have the definitions set forth in the Agreement.

REMAINDER OF PAGE LEFT BLANK INTENTIONALLY

IN WITNESS WHEREOF, the parties hereto have each caused this NDRA to be executed on or as of the day and year first above written.

**“CITY”**

CITY OF MESA, an Arizona municipal corporation

By: \_\_\_\_\_

Its: \_\_\_\_\_

**“DEVELOPER”**

\_\_\_\_\_,

a(n) \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

**“LENDER”**

\_\_\_\_\_,

a(n) \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

**Acknowledgment by City**

STATE OF ARIZONA )

) ss.

County of Maricopa )

The foregoing was acknowledged before me this day of \_\_\_\_\_, 200\_, by \_\_\_\_\_, the City \_\_\_\_\_ of the City of Mesa, on behalf of the City.

\_\_\_\_\_  
Notary Public

My Commission Expires:  
\_\_\_\_\_

**Acknowledgment by Developer**

STATE OF ARIZONA )

) ss.

County of \_\_\_\_\_)

The foregoing was acknowledged before me this day of \_\_\_\_\_, 200\_, by \_\_\_\_\_, the \_\_\_\_\_ of \_\_\_\_\_, a(n) \_\_\_\_\_, on behalf of the \_\_\_\_\_.

\_\_\_\_\_  
Notary Public

My Commission Expires:  
\_\_\_\_\_

**Acknowledgment by Lender**

STATE OF ARIZONA )

) ss.

County of \_\_\_\_\_)

The foregoing was acknowledged before me this day of \_\_\_\_\_, 200\_, by \_\_\_\_\_, the \_\_\_\_\_ of \_\_\_\_\_, a \_\_\_\_\_, on behalf of the \_\_\_\_\_.

\_\_\_\_\_  
Notary Public

My Commission Expires:  
\_\_\_\_\_

**EXHIBIT A  
TO  
NON-DISTURBANCE AND RECOGNITION AGREEMENT  
(LEGAL DESCRIPTION OF THE PROPERTY)**

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